AMERICAN BAR ASSOCIATION JOVRNAL

March 1947

VOL. 33 NO. 3

Francis A. Garrecht
Senior Circuit Judge - Ninth Circuit

Contents

March 1947

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois. Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912. Price: per copy, 75c; to Members, 50c; per year, $5.00; to Members, $1.50; to Students in Law Schools, $1.50. Vol. 33, No. 3.

In This Issue

(Continued on page V)

(Continued from page 111)
dicial decisions or legislative action, within the time between the preparation of an article for this issue and its arrival on the desks of our readers. The questions of law as to the suits and the validity of present legislation have been extensively discussed in the public press. The complex questions as to the recoupment of retroactive payments by employers, from the Government or other sources, have not been as fully or dependably discussed. Benjamin H. Long's article may be useful to lawyers who have to cope with those questions, as to whatever claims are finally allowed and upheld.

Readable Reviews in "Books for Lawyers" **13**

In addition to features mentioned elsewhere: Walter P. Armstrong writes reminiscently of *Southern Oratory*, mostly by lawyers. The Holmes letters from his Civil War days *(Touched with Fire)* receive an inspired review from Charles P. Curtis, Jr. Reginald Heber Smith uses John S. Bradway's *Clinical Preparation for Law Practice* to thrust challenging questions at law schools and lawyers. New books on the Lanham Trademark Act of 1946 and on the Wagner Act and employer's rights are reviewed, as is the ninth edition of Professor Corwin's provocative *The Constitution As It Is Today*.

Decisions in Courts, Departments and Agencies **16**

District Judge Picard's decision of February 8 on the further hearing in the celebrated *Mt. Clemens Pottery Company* case is analyzed by Edward J. Dimock in this issue.

Progressive Development of International Law **17**

Our newest department is inaugurated; its contents will depend on "trial and error", as to what is found to be interesting, informative, even useful, to our members generally, as they become aware that for effective advice and advocacy for their clients, even in federal and State Courts, they will need to acquire an increasing knowledge of the tools of international and comparative law, even as they now know their codes, rules, and precedents of domestic substantive and adjective law. This issue contains only a beginning of what can be adduced.

American Bar Association 1946-1947

President CARL B. RIX, Wells Building, Milwaukee 2, Wisconsin
Chairman, House of Delegates HOWARD L. BARKDULL, Union Commerce Building, Cleveland 14, Ohio
Secretary JOSEPH D. STECHER, Toledo Trust Building, Toledo 4, Ohio
Treasurer WALTER M. BASTIAN, National Press Building, Washington 4, D. C.
Assistant Secretary RONALD J. FOULIS, 1010 Pine Street, St. Louis 1, Missouri
Executive Secretary OLIVE G. RICKER, 1140 North Dearborn Street, Chicago 10, Illinois

Board of Governors

The President,
The Chairman of the House of Delegates,
The Secretary,
The Treasurer,
WILLIS SMITH, *Last Retiring President,* Security Bank Building, Raleigh, North Carolina
WILLIAM L. RANSOM, *Editor-in-Chief* of the *American Bar Association Journal,* 33 Pine Street, New York 5, New York
} *Ex officio*

First Circuit	HENRY C. HART, Hospital Trust Building, Providence 3, Rhode Island
Second Circuit	DEANE C. DAVIS, National Life Insurance Company, Montpelier, Vermont
Third Circuit	WILLIAM CLARKE MASON, 123 South Broad Street, Philadelphia 9, Pennsylvania
Fourth Circuit	FRANK C. HAYMOND, Supreme Court of Appeals, State Capitol, Charleston 5, W. V.
Fifth Circuit	CODY FOWLER, Citizens Building, Tampa 2, Florida
Sixth Circuit	MITCHELL LONG, Hamilton National Bank Building, Knoxville 02, Tennessee
Seventh Circuit	HAROLD H. BREDELL, 21 North Pennsylvania Street, Indianapolis 4, Indiana
Eighth Circuit	A. W. DOBYNS, 314 West Markham Street, Little Rock, Arkansas
Ninth Circuit	LOYD WRIGHT, 111 West Seventh Building, Los Angeles 14, California
Tenth Circuit	WILLIAM O. WILSON, Majestic Building, Cheyenne, Wyoming

Announcement . . . of 1947 Essay Contest conducted by American Bar Association pursuant to terms of bequest of Judge Erskine M. Ross, Deceased. Information for Contestants

Subject to be discussed:

"How Can International Legislation Best Be Improved—By Multi-Partite Treaties, or by Giving Powers to the General Assembly of the United Nations?"

Time when essay must be submitted:
On or before May 1, 1947.

Amount of Prize:
$2500.00 *

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 31, 1947, (except previous winners, members of the Board of Governors, Officers, and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest should communicate promptly with the Executive Secretary of the Association, who will furnish further information and instructions.

AMERICAN BAR ASSOCIATION

1140 N. Dearborn Street **Chicago 10, Illinois**

* Amount of award reduced this year because of decreased income from securities in Ross fund

1

Administrative Procedure:

More About Selecting 350 Hearing Examiners

■ In March the announcements and instructions will be made available for judges and lawyers who wish to consider applying for appointment as Hearing Examiners for federal agencies under the Administrative Procedure Act. Some 350 appointments are to be made by June 11. Supplementing what was stated in our January number (page 1), we give in this issue such further information as is thus far obtainable. The Advisory Committee constituted by the U. S. Civil Service Commission has not yet completed its studies and recommendations.

These Examiner posts will be attractive to men with an experience, temperament and aptitude for quasi-judicial work of great responsibility. Judges and lawyers may be startled to find that the salaries for these posts will exceed those paid to many judges in the Courts of some of the States. At that, the salaries of Examiners will not be high, in view of the required qualifications and the responsible duties.

The information thus far available indicates that the possession of experience and qualifications will be necessary, in order to be considered for one of these appointments. Present Examiners will not be automatically "covered in", it is said. Their experience as Examiners will doubtless work in their favor. The as yet unanswered question is as to how it will be assured, if at all, that the final selection will be of men who are free from bias, ideological preconceptions, partisan fealty, subservience to "pressure groups", habits of unfairness, disregard of the true values and weight of evidence. Many of the Hearing Examiners in office seem to have experienced a change of mind and method, if not of heart, since the new Act became effective and tended to give them some sense of security and independence. Long experience in being unfair should in some manner be discounted as a factor in selection.

Members of the Bar will follow with the closest interest the further developments in this field, to see to what extent the declared intent of the Act is carried out in good faith, by those charged with responsibility for the various steps in the selection of these important quasi-judicial officers. Vacancies in federal judicial offices arise only occasionally; the total number of judicial appointments to be made and confirmed in any one year is not large. Here are 350 appointments to be made within about three months, to highly important quasi-judicial posts. Confirmation by the Senate of the United States is not required under the present law.

■ Although a desire for good government and for the fair and equitable administration of justice may be assumed to be held on all sides, members of the profession of law understand fully that the actual working out of the methods and details is essential and that widely different results may be obtained from the methods chosen. The JOURNAL has kept its readers advised, during the past year and theretofore, concerning the various reforms undertaken in the field of administrative law, particularly the evolution and adoption of the federal Administrative Procedure Act. While a large part of the effectiveness of that statute in its application to particular cases must necessarily lie with an alert and intelligent Bar, the United States Civil Service Commission and the several federal agencies have an important part to play, under the Act as it stands, in fulfilling the intent and terms of the Act through the selection of the Hearing Officers.

Studies and plans for the selection and appointment of these important examiners have been proceeding rapidly during the last two months at the Nation's capital. The impact, purport, and far-reaching significance of the Administrative Procedure Act is coming to be more fully appreciated. In fact, the situation is not without its drama. Within the Government itself there has been a tendency to draw lines between the managers of agencies and those who do the work of administration in specific cases. Budgetary officers are concerned at the need for revision of long-standing patterns. Bureau chiefs

are thinking about both their control over operations and the preferred status to be conferred upon Examiners. Agency heads understand that the Act ought to mean, and sooner or later be made to mean, a deep revision of attitudes all around.

History of Hearing Examiners for the Agencies

In the history of modern administrative procedure in the federal Government the Examiner has been the subject of two contradictory trends. His office springs from the judicial system which, in the form of "masters" and "referees" and "commissioners", recognizes that the administration of justice often requires the delegation of functions of hearing, fact-finding, computation and reports. The need for such delegation has been deemed to be greater in the federal Government than in the States, because of the greater volume of work and greater territorial jurisdiction of federal agencies.

So far as federal administrative authorities are concerned, the Examiners have come to be their masters in chancery. They have been honored as such, and also compensated as such. Indeed, other governmental agents who perform lesser functions have sought and secured the title of Examiner.

At the same time, there has been operative a definite tendency to play down the function of the Examiner. His authority and functions have often been held to be merely "advisory". Some agencies have regarded them as having no greater office than to preside over and police the hearing—something less than a "moderator", much less than an umpire. In the last ten years or more, there have been attempts to find substitutes for their "intermediate" reports and findings. Agency counsel and subordinate administrators unfettered by quasi-judicial concepts of putative fairness, have attained superior positions, salary-wise and in other ways.

Nonetheless, virtually all comprehensive studies have emphasized the superior function and duties of the Hearing Examiner as a part of the administration of justice by agencies. The Attorney General's Committee on Administrative Procedure decried the lack of real authority in the Examiners, the substitution of "anonymous reviewers" who had not seen the witnesses or heard the evidence, and the practice of agencies to conduct the hearing through "interlocutory appeals", etc., from behind the scenes. That Committee felt it "necessary that the evidence be heard and the facts be reported to the agency head by an official who shall command public confidence". The basic recommendation of the majority of the Committee rested almost entirely upon a revision of the Examiner system. In addition, the whole Committee stressed the need for security of tenure and adequacy of compensation for Examiners.

Betterments Introduced by the Procedure Act

The new Administrative Procedure Act adopted those recommendations in general. It provides a greater security of tenure. It provides improved safeguards in the matter of compensation. As a matter of fact, it had been strongly urged that Examiners be removed from the agencies altogether and made an independent group. The Congress, faced with both demands for Examiner independence and agency pleas for Examiner specialization, devised Section 11 of the Act, in an effort to provide both.

In doing so, the Congress placed the United States Civil Service Commission in a position of unprecedented importance; and it actually increased the responsibilities of agencies in making appointments of Examiners in the first instance, for the reason that if an agency makes an improvident appointment, undoing the mistake will be a long and difficult process. The responsibility for assuring beyond peradventure the independence and impartiality of the Examiners remains a primary and urgent duty of the Congress.

Duties of Examiners Under the New Act

There is not the space here even to outline the basic functions and multifarious duties of Examiners under the new Act. Section 7 (b) enumerates the general field of their activities to be to "(1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule upon offers of proof and receive relevant evidence; (4) take or cause depositions to be taken whenever the ends of justice would be served thereby; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by consent of the parties; (7) dispose of procedural requests or similar matters; (8) make decisions or recommend decisions in conformity with Section 8; and (9) take any other action authorized by agency rule consistent with this Act."

Sections 5, 6, 7, and 8 amplify this enumeration. Section 8, relating to decisions, is particularly important.

Prospective Qualifications for the Hearing Examiners

All Examiners qualified to perform functions under the Administrative Procedure Act must be appointed pursuant thereto not later than June 11 of this year. The first question that has arisen is naturally: What of the present Examiners? They of course are entitled to compete for the positions. As a group they will not be "covered in", as the phrase is generally used in Civil Service matters. If they are presently under Civil Service, have been performing the functions now required to be performed under the Act, meet other qualifications fixed by the Civil Service Commission, and are reappointed by their agencies, then they may become Examiners under the new Act. Appointments need not be limited to those already serving.

The important question is that of the qualifications to be required, whether of present Government personnel or those outside Government who wish to be considered for these

positions. Experience with public regulation in the subjects handled by federal agencies will be required. Such experience may be obtained in or out of Government. It may include public regulation through Courts as well as administrative agencies. It may be acquired in the State as well as federal sphere. At least five years of such experience will probably be required, which would seem to be a minimum in view of the nature of the duties to be performed. That does not mean, however, that a private practitioner must have devoted all of his time to "administrative law" practice, but his experience must have included substantial responsible work in the field of governmental regulation. As a matter of fact, Examiners will be the better if they have had both general and specialized experience.

Written Examinations Not Likely to Be Required

Although there will probably be no requirement that all Examiners must be lawyers, it is admitted on all sides that legal training or some very special substitute training and experience will be necessary. Some agencies are of the view that Examiners should first be good lawyers regardless of specialized experience, while a very few regard technical or scientific competence the first requisite. The Civil Service Commission will, as is usual, make up a file of eligibles and then prepare special lists from which agencies may choose Examiners.

In determining both eligibility and the priority of applicants, written examinations are not likely to be adopted. On the basis of credentials submitted, the Commission may make individual investigations. Oral examinations may be provided. Both diversity and specialization of experience will be considered as important factors. Others will be the ability to do the things required of Examiners—to preside, to evaluate evidence, to find and state the facts, to interpret and apply laws, to write decisions or recommended decisions, etc.

Problems in the Classification of Examiners

An equally difficult problem is the matter of classification and compensation of Examiners. The Classification Act requires federal employees to be placed in various grades and compensated accordingly. Although the Administrative Procedure Act does not do away with classification for Examiners, and although it is generally admitted that there should be some variation in Examiner positions, it is also desirable to avoid the stratification of Examiners within agencies. Both for the efficient utilization of an Examiner staff and for the benefit of the Examiner, it is highly desirable that the individual Examiner's work be diversified. To do so will make impracticable the rigid classification of agency cases and appointment of Examiners for work on such cases only.

Presumably some broad and rational basis of classification will be adopted, based mainly on the fundamental duties of Examiners under the Act and secondarily upon the nature of the functions performed by the particular agency of which they are attached.

Prospective Salaries for Hearing Examiners

Under the Civil Service system compensation must be related to classification. Before the war the Attorney General's Committee recommended a sharp increase in Examiners' salaries. The minority of that Committee recommended a top Examiner salary of $9000 per year, while the majority recommended only $7500. Either figure then would have been a major increase. Today Government compensation has been greatly increased for all types of work. On the other hand, in the fixing of an Examiners' scale some consideration should be given to the fact that it is likely to be a long-term proposition and to the fact that the upper limit of compensation in the Executive branch remains at $10,000. Examiners' salaries are now far too low.

Present discussions relate both to the minimum and maximum salaries. There is considerable difference of opinion as to whether the lowest Examiner salary should begin at $5000 or $6000; that is, in Grade P-4 or Grade P-5 in the Civil Service classification. The top would be $10,000 in any event. Whatever these outside limits may be in the end, the real problem will be that of allocating positions within an agency and classifying its work. A few well-paid Examiners in a large agency such as the Interstate Commerce Commission does not mean that the Examiners as a group are there well compensated. In this general connection it is also to be kept in mind that the increase of Examiners' compensation does not mean a *pro tanto* increase in government expenditures. If the Examiners are men of the ability necessary to perform the functions assigned to them under the Administrative Procedure Act, they will perform real functions efficiently and will also make unnecessary as well as unlawful the large corps of "anonymous reviewers" and revisors found in some Government agencies.

Those Interested May Obtain Announcements

The Bar will undoubtedly be interested to know that the federal Examiners as a class were first apprehensive. Some feared a competitive examination. Others have been concerned whether they will be reappointed under the Act. Generally speaking, they are beginning to find that the Act is a recognition of the high function performed by Examiners. As a group they have recently formed a voluntary and independent Examiners' Conference, in which, however, the Examiners for the Interstate Commerce Commission declined to participate. Those outside the Government who desire to consider applying for these positions should write to the U. S. Civil Service Commission, Washington, D. C., asking that they be sent the announcements and instructions when released.

2

Fight for Our Institutions:

"Set Ye up a Standard in the Land"

by Robert G. Simmons • Chief Justice of the Nebraska Supreme Court

■ This militant plea that judges, lawyers, and non-lawyers go to work together and in earnest to re-establish in full vigor a spiritual faith in the duties and rights of men, vouchsafed by impartial justice administered through competent Courts fully empowered to correct the abuses and denials of rights by quasi-judicial agencies, was prepared by the Chief Justice of the Supreme Court of the State of Nebraska. In accordance with the policy of our Association's Section of Judicial Administration, of which he is the 1946-47 Chairman, he delivered it as an address before an audience of non-lawyers, at the annual meeting of the American Political Science Association in Cleveland. "Lawyers and judges make too many of their speeches to and at each other," he once said. "Why not talk where it will do the most good?" The *Journal* has condensed his address to form the present paper.

Robert Glenmore Simmons was born in Scotts Bluff County, Nebraska, in 1891, and was graduated in law at the University of his State in 1915. Beginning practice in Gering, he became county attorney of his native county, but resigned to serve as a spherical balloon pilot, observer, and commander, in World War I. He was a Republican Member of Congress from the 6th Nebraska District during 1923-33. He was elected as Chief Justice of the Supreme Court of his State in 1938. He has been a member of our Association since 1937, and has actively advocated many of its objectives.

His present message from an ancient text has great cogency and timeliness for American lawyers. His preachment is no counsel to "stand still" or "hold back"; his program for steady advance and improvement in procedures is specific, particularly in the domain of the States. In these respects his address supplements Judge Julian P. Alexander's plea in our January issue that the States should prepare themselves to fulfill capably their duties as well as their rights. Judge Simmons sees clearly that the substance and vitality of the American system of law and justice is and must be *spiritual*, and that standards of faith and fidelity to human rights and to constitutional safeguards must be set up and adhered to vigorously, else the most skillfully designed procedures will become mechanistic materialism that avails little or nothing.

■ "Set ye up a standard in the land." The words are not mine. They are the translation of a passage in the book of Jeremiah as related to me by a devout man of God. They were spoken some thousands of years ago, at a time when civilization had progressed but little along its way. The Hebrew people were then in confusion, disturbed by problems of state, concerned with their rights as individuals and as a Nation, seeking the course to follow. A young man of the nobility, later known as Jeremiah the Prophet, went among them, calling for the setting up of standards. He referred not to standards of colored bunting, but to standards of government, ideals of citizenship, principles of the rights of men, around which a distracted people could gather and make common cause.

Throughout the intervening centuries, peoples and nations have come to periods where they found it necessary to set up standards and then to chart their course in accord with them. Likewise, there have been recurring periods where peoples, finding themselves in troubled times and seeking a solution to their problems, have turned again to proven ideals and standards of the rights of men, and so have recharted their course.

It is my belief that we have come to a time in America when we should revitalize our understanding and faith in the long-recognized ideals and standards of our government, so that they again mark and guide our course.

ROBERT G. SIMMONS

Making Old Ideals Again Effective

The overt act by which our colonial fathers sought to establish their independence as a people from the sovereignty of Great Britain was not a movement to declare new standards and new ideals of government. It was rather a determination on their part that old ideals of the rights of peoples should be made effective. To that end they undertook, at first by peaceful means and finally by force of arms, to secure the independence that would permit the organization of a government through which they might more nearly realize the faith that was theirs. What was the faith they declared, as they appealed "to the Supreme Judge of the World for the rectitude" of their intentions? They stated it simply: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness—that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

There was nothing new in the "truths" they declared. Their source was not in the political thinking of the time. They were age-old in the spiritual faith of men. Our colonial fathers had divergent views of many things, but they believed in God and in man's brotherhood. In that faith they had a common accord. In a document of government they stated that faith and their purpose. They declared that every man stood the equal of his fellow in the eyes of his government, and that was man's brotherhood in self-government. They stated that men had unalienable rights. The source of those rights was not in man but in God. They declared, not for the rights of governments, but for the rights of men to be realized through governmental action—rights of men as individuals that governments must respect and protect and be without power to invade.

Constitutional Safeguards of Men's Rights

Constitutions were adopted declaring the supreme will. The executive, legislative, and judicial departments were created, subject to and to implement that will. But note the differences in their purposes. The legislative department speaks the intent of the people as a whole. The executive is charged with the administering of that will, again for the people as a whole. The judicial department functions with reference to the individual in the determination of his disputes, not only with his fellow, but with his government. Important as that function is, there is likewise, from the standpoint of free men, the power and duty placed in the Courts of protecting the unalienable rights of men, not only as against their fellows, but likewise from invasion by the strong arm of government itself. The placing of that responsibility in the judicial department and the unfettered exercise of that power by an independent judiciary were the means adopted to safeguard the individual in his God-given freedoms.

It is to the Courts and the Courts alone that the individual may go and have a judicial determination of his disputes and secure judicial and effective protection, not as a matter of privilege, but as a matter of constitutional right. Therein is one of the great distinguishing features of our American systems of government from others now powerful in the world. Those standards become realities in the forum of the Courts.

Historic Prerogatives of the Courts

During the years of the establishment of our government and the growth of our Nation, the Courts have been set up, their worth determined, their power recognized. By and large they have served full well the purposes of their creation. But it has not been without difficulty. When the Nation and States were young, the original simple machinery of the Courts first created functioned well. But the Nation grew and its problems became complex. The people turned more and more to the use of governmental power and agencies for the control or modification of tendencies of various forces of the Nation. This put additional burdens on the Courts. The impact at first did not strike the federal system, but rather the Courts of the States. A vague discontent with the Courts appeared. This was directed not at the rules of substantive law as stated by legislatures and Courts, but at procedures and, somewhat less, at rules of evidence enforced in the determination of substantive rights.

To correct this situation there was adopted in New York a century ago a code of procedure known as the Field Code. This Code, modified in many particulars, was adopted initially as their adjective law by many of the Western States, at or before their admission to the Union. That tendency continued. Many of the older States supplanted their common law procedures with codes. Courts were expanded and new Courts created, sometimes with overlapping and conflicting jurisdictions. But these changes did not proceed sufficiently, either in time or scope, to meet increasing demands. We had half a hundred systems of procedural law followed in an equal number of judicial systems.

Abuses Grew with Administrative Agencies

It was found that certain types of regulatory matters could be administered more adequately by tribunals set up in the executive departments. These agencies came in time to exercise quasi-judicial functions. Likewise, legislation was passed creating new rights and duties in many fields, such as Workmen's Compensation Acts. Tribunals were set up to administer those Acts, and there were created boards and commissions upon which were conferred judicial powers. The creating of these separate administrative tribunals all seemed to have the purpose in part of avoiding the adjective law of the Courts, and at the same time undertaking to retain the safeguards of the judicial department by providing for appeal to the Courts.

As these non-judicial tribunals expanded in number and power, the saefguard of appeal to the Courts was restricted. Individuals began to find that rights which were safeguarded in the Courts were only inadequately preserved in tribunals that acted independently. They found also that the administrative tribunal is too often not free of executive control, nor political influence, nor do its members have the security of tenure that renders pressures ineffective.

Powers of the Courts Are Taken Away

But these administrative tribunals were created by legislative act and controlled by the legislative will. During these last twenty years this movement away from the judicial department of government has progressed to where there now exists at least one private agency, National in scope, which has set up a system of arbitration of disputes in the broad area of business, labor, personal injury and property damage, and specialized systems for particular industries. It has created its own machinery of operation, set up its own system of rules of procedure, provided its personally selected arbitrators, and offers to give a final and conclusive determination on any dispute submitted to it. It goes further and suggests that contracts provide that any controversy or claim arising therefrom be submitted to it for settlement by arbitration.

I need but point out that here exists a system for the settlement of disputes that is, as to rules and personnel, entirely removed from the sanction, direction, or control of either the legislative or judicial departments of government. The age-old and time-proved safeguards of the rights of men which inhere in the Courts are completely by-passed. Its effect upon and danger to the constitutionally-protected rights of men, including the right of trial by jury, are at once apparent.

Procedural Improvements in the Courts Have Lagged

These conditions have arisen in part because some Courts have not moved quickly in reforming their procedures. In part they have arisen because some Courts have not been given the power of conforming the judicial processes to present-day conditions or needs, and in part because legislative bodies have not responded to the demonstrated need of releasing the rigors of old rules in the field where they have acted, and in not creating procedures in the new fields where action is clearly indicated.

Court-stated and legislatively-enacted substantive law has not been immobile. Courts have restated the law in the light of existing needs. Legislatures have reacted quickly to indicated changes in the legislative substantive law field. But procedural changes have been slow, because they have been little understood by laymen and their effect upon substantive rights indirect and somewhat elusive.

Lawyers on the bench and at the Bar have been aware of the need of procedural reform and have urged it, but these reforms in most instances must be secured from legislative bodies. Too often legislative bodies, under the urge of a particular problem, have adopted substitutes rather than attempted to remove the source of judicial procedural difficulties. Too often procedural reforms have failed because of a lack of public understanding and resulting public urging of the indicated changes. It is a problem that requires comprehensive and co-

operative action on the part of the lawyer, the legislator, and the layman, and all three mean the public.

Progress in Improving the Federal Administration of Justice

Progress, however, has been made. I have referred to the Field Code by which many of the States were relieved of the restrictions of the common law procedures. The impact of the growth of National legislation and National governmental action during this last quarter of a century has reached the federal judicial system. Within the last ten years, by cooperative action between the Congress and the Supreme Court of the United States, the federal Courts have adopted a complete and up-to-date code of Rules of Civil Procedure. Without too much exactness it may be said that the federal rules are based in part upon the broad outlines of the Field Code, changed and supplemented as present conditions require. They are rules subject to change and growth by Court order as experience demonstrates a need. These rules have moved in the direction of the elimination of unnecessary delays, technicalities, and complexities, and toward simplicity, adaptability, expedition, and thoroughness in securing a right answer. They have brought order out of a situation once described as systematic chaos in the federal system. Within the year there has also been adopted, in like manner, a Code of Criminal Procedure for the federal Courts.

Two other improvements in the federal system should be mentioned: By authority of the Congress, Judicial Conferences now are being held annually in the various circuits, where judges and lawyers, and in some instances laymen, meet for an exchange of views and a study of the problems of judicial administration. In 1939, there was created by Act of Congress the Administrative Office of the United States Courts, to manage and supervise the administrative work of the Courts as distinguished from their judicial work. The work of the Office is being well done and its need fully justified. It not only is doing the administrative work better, but it has relieved the Chief Justice and the Senior Judges of the circuits of much detail, and accordingly allows more of their time to be devoted to the business of judging. The federal system is adjusted to meet the increased burdens of litigation that have come to it.

Progress in the States Has Fallen Behind

Until the last few years, forty-eight States had forty-eight separate systems of judicial procedure. I have mentioned the Field Code. Those States adopting it have many important points of similarity, nevertheless each has a wide disparity in detail. Many of the States retain considerable of the procedures of the common law. In Florida and Texas there are vestiges of the procedures of Spanish law. Louisiana has a procedure based upon the Code Napoleon. The procedural perplexities of such a series of systems are apparent.

It is quite clear that there could be a better administration of justice and that at the same time the full independence of the judicial departments of the States could be maintained, if there were one general system of procedure applicable to all jurisdictions, but modified as State conditions require.

Since the adoption of the federal Rules, nine States have adopted codes of procedure modeled thereon, and sixteen States now have similar projects actively under way.

The American Bar and State Bar Associations, and lawyers and judges active in their affairs, have vigorously supported and promoted these programs. It has not been without the expenditure of time and effort, or without opposition, for in the legal profession there are those content with the *status quo,* and also those who view with concern the evidences of discontent with our procedures and the growth of extra-judicial bodies and yet see no need for change.

Other State Judicial Reforms Under Way

In addition to rules of procedure, other improvements in the judicial departments of the States are being encouraged. Regularly held Judicial Conferences now exist in about half of the States. They should be encouraged and expanded. Their effectiveness could be greatly increased if laymen and students of government were joined in these activities.

Just as the development of the Administrative Office of the United States Courts was necessary in the federal system, so it is necessary in the systems of many of our more populous States. With only few exceptions, no State has any agency that performs any substantial part of the functions now performed by the United States agency. The Section on Judicial Administration of the American Bar Association has caused a study of the matter to be made, has drafted model bills for possible State use, and has a Committee ready and anxious, to give assistance to those in the States who are willing to undertake the promotion of such a task.

The Courts of Limited Jurisdiction

Attention might well be given to restoring the rule-making power to the Courts where it inherently belongs. Of two other matters, one is actively being carried on; the other is meritorious but presently quiescent. From the beginning the Nation has had the service of justices of the peace and municipal and limited jurisdiction Courts, for the trial of minor offenses. They are the Courts that touch more people directly than all other Courts combined. There the individual knows justice, or what passes for it, as judicially administered. There respect or lack of respect for the judicial process and law is taught. Those Courts exert a tremendous influence upon the public attitude toward law enforcement and law observance. On the whole they have never functioned too well, but have been retained because they

2

Fight for Our Institutions

are the Courts nearest the individual, where his rights may be determined.

The increase in subjects regulated by ordinance and statute, with violations punishable as misdemeanors, and particularly the increase in traffic violations, has thrown a burden upon those Courts that they are in many instances utterly unable to handle, as to quarters, personnel, or training. The present handling of misdemeanor cases in these Courts frequently does not do justice and results in a situation bordering on the scandalous.

Studies of rules of evidence for all Courts and codes of evidence have been drafted which are suitable for adoption as a body of rules, by Courts having that power or by a legislative body. They rest quietly on the shelves of the libraries of the country. Their sleep should be disturbed, their merits debated, and their benefits made available to the Courts.

Improving Judicial Administration Is Vital

The vital interest of the bench and Bar of America is in the reorganizing and implementing of the judicial machinery, so that it will be able more adequately to serve the needs of the American people as it was intended to do, and must do, if our system of government is not to be vitally weakened and changed. We face the disturbing truth that more and more the determination of the rights of men and the solution of their problems are being taken from the constitutionally created Courts designed to determine them and are being handed over to official administrative tribunals and private arbitrators.

The people are entitled to a speedy, inexpensive, sensible, just trial and determination of these matters. They will have it, either in the Courts or in tribunals official and unofficial. They have not lost confidence in the judicial process. They have not lost confidence in the supremacy of the law nor in its proper administration. They desire the maintenance of their constitutional rights and safeguards. Their discontent goes not to substance but to means of achieving it. The causes of their discontent must be removed. It is our job to lead the way.

The state is not a perfect institution. It approaches perfection only to the extent that the moral forces of its people compel that perfection. The law can maintain no standard for a people higher than the people set up for themselves. If the standards of a people are lowered, the standards of government are lowered.

Spiritual Faith Is Essential

The spiritual faith of the men who built our institutions is the substance of things realized and realizable in America. It is the faith that has guided our leadership. It shaped the opinions that resulted in the establishment of our legal standards of right and wrong. It has directed the course of our public life. Our whole governmental structure recognizes the hand of God in the affairs of men. Our basic religious beliefs and our democracy are inseparable. Just as an educated citizenship is necessary to the maintenance of free government, so a religious citizenship is necessary to maintain life and vitality in the principles upon which our free government rests.

3

Second 1947 Regional Meeting To Be Held in Jacksonville

■ The next Regional Meeting of the Association under the new constitutional plan (see our February issue, page 183) will be convened at the George Washington Hotel, in Jacksonville, Florida, on Friday and Saturday, May 2 and 3. President Carl B. Rix will preside at all sessions.

The States to be particularly covered, with their respective numbers of members in the Association, are:

Florida	862
Georgia	597
Alabama	341
South Carolina	283
North Carolina	587

Any member of the Association in any State may attend any Regional Meeting, which is a "local Assembly" of the Association, leading to the sessions of the Assembly at the Annual Meeting. Resolutions for consideration by the House of Delegates may be offered by any member at any Regional Meeting. A large attendance of Association members is hoped for.

The subjects to be particularly considered in the addresses, papers, and floor discussions, at the Jacksonville meeting, will be:

Improving the administration of justice

Developments in labor relations law

Administrative procedure under the new Act

Progressive development of the principles of international law

Efforts will be made to develop and present material of a useful character for practising lawyers.

Reservations for hotel rooms and for tickets for dinner and luncheon sessions may be made through the chairman of the local Committee on Arrangements, Edward S. Hemphill, Florida National Bank Building, Jacksonville 2, Florida.

4

Tort Claims Against Government:

Municipal, State and Federal Liability

by Edwin Borchard • of the Yale University School of Law

■ After analyzing usefully the not-yet-familiar provisions of the Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946), Professor Borchard summarizes for our readers the studies and reports as to municipal and State liability and procedures, in which a Committee of the Section of Municipal Law has been engaged under his chairmanship. Those who wish the fuller text and valuable annotations contained in the reports may write Paul A. H. Shults, Secretary of the Section, at 105 South La Salle Street, Chicago 3, Illinois. An amplification of some of the material, with the annotations, was published in the Duke University Law School's *Law and Contemporary Problems* (Spring, 1942).

Professor Borchard is well known to our readers for his outstanding contributions in several fields of law. Born in New York City in 1884, he first achieved eminence in international law, and served his country abroad in several capacities, in addition to his teaching at the Yale School of Law. For many years he was closely associated with Judge John Bassett Moore, beloved dean and leader of America's teachers and jurisconsults in international relationships (32 A.B.A.J. 575). Professor Borchard's constructive services as to Declaratory Judgments Acts, in cooperation with our Association, made him foremost in that field. More recently, his studies and legislative draftsmanship as to tort claims against governments have evoked widespread interest and support. Our space permits him only to summarize his comprehensive studies. With Professor Borchard's analysis of the Federal Tort Claims Act should be read Harold G. Aron's comments and questions, which follow the present article; also former Congressman Aaron L. Ford's exposition in our September issue (pages 741-744).

I. Federal Liability in Tort

■ The La Follette-Monroney Act, cited as the Legislative Reorganization Act of 1946, contained so many novel features for the reform of the United States Congress that its inclusion of the Federal Tort Claims Act has not received the notice it deserves.

This revolution in our federal substantive law incorporates a reform first advocated by the Underhill bills of 1924 and 1925. Although in fact the two houses of Congress did agree in 1928 on the relief of the Committee on Claims through a Federal Tort Claims bill, the measure was vetoed by President Coolidge at the instigation of the Department of Justice, with the consent of Senator Deneen who was then in charge of the bill on the ground that the Comptroller General had made himself not only the court of first instance in determining tort claims but also the attorney of the United States in defending appeals to the Court of Claims from his judgment. This was too much for the Attorney General to tolerate.

While the bill has since then been passed twice in the House and twice in the Senate, this was not accomplished in the same session until 1946. As recently as 1942, President Roosevelt[1] urged Congress to permit tort claims to be decided by a Court of law instead of by the political Committee on Claims—a procedure which often not only frustrated justice but absorbed the time of the Congress in dealing with private claims.

Summary of the 1946 Legislation

Title IV of the La Follette-Monroney Act contains the Federal Tort Claims Act, which follows very closely the terms of the original Underhill bills of 1924 and 1925. It begins with the definition of "federal agency," "employee of the government," and "acting within the scope of his office or employment."

The next part deals with the administrative adjustment of tort

1. 88 Congress. Record, January 14, 1942, page 323.

EDWIN BORCHARD

claims against the United States, and leaves in force the provision of the Act of 1922, which gave the administrative department or agency power to settle claims of less than $1,000. The claims are to be paid out of appropriations that may have been made by Congress, and Congress is annually to receive from each agency a report of the claims paid. While the section is not as clear as it should be, it is presumed that even though the claimant asked for more, the department or agency involved may settle the claim if he is willing to accept less than $1,000. The substantive provisions of the section relate to damage to property or personal injury or death "caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment." The United States is as liable as a private person would be for such a loss or injury.

The Attorney General is authorized to compromise or settle any claim whether under or in excess of $1,000. Only it is provided that if he settles one of the larger claims, he can do so only with the consent of the Court.

Jurisdiction Given to the District Courts

Claims on which the claimant is unwilling to accept $1,000 or less, and all larger claims, are assigned to the District Court of the United States for the district wherein the plaintiff is resident or wherein the act or omission complained of took place. The claim is to be heard by the Court sitting without a jury. In contrast with former legislation, no ceiling is placed on the amount that may be claimed.

The United States assumes the same position as a private defendant, except that the United States shall not be liable for interest prior to judgment or for punitive damages. Costs are to be allowed in all Courts, to the successful claimant, to the same extent as if the United States were a private litigant, except that attorneys' fees are not to be included. The judgment obtained by the claimant is a complete bar to any action against the employee of the government whose act or omission gave rise to the claim. If the claim has already been presented to a federal agency, no suit is to be brought upon it unless the federal agency has made a final disposition of the claim; provided, however, that the claimant may, upon fifteen days' notice in writing, withdraw the claim and commence suit thereon, and provided, further, that the suit shall not be instituted for a sum in excess of the amount claimed from the federal agency unless newly-discovered evidence has increased the claim.

Procedure, Judgment and Review

The procedure follows the Civil Practice rules adopted by the Act of June 19, 1934. The same provisions for counterclaim and set-off, for interest upon judgment, and for payment of judgments, are applicable as were embodied in the Tucker Act of 1887. It is important to note, however, that the phrase "not sounding in tort", which is in the Tucker Act, is necessarily eliminated.

Final judgments in the district courts are reviewable in the circuit courts of appeal or in the Court of Claims. The provisions of Sections 239 and 240 of the Judicial Code, relating to certiorari and the certification of questions to the United States Supreme Court, remain in force. By another section, as already observed, the Attorney General is authorized to arbitrate, compromise or settle any claim on which suit has been brought, provided he obtains the consent of the Court thereto.

A Short Statute of Limitations

It is possible that claims will still be presented to the Congress. The new

Act contains a short statute of limitations which bars claims under the Act which are not presented within one year after the claim accrued or within one year after the date of the Act, (August 2, 1946). If a claim for less than $1,000 is presented to a federal agency, the time to institute a suit is extended for six months from the date of mailing a notice to the claimant by the federal agency as to its final disposition of the claim.

Exceptions to Jurisdiction Under the Act

Although the new Act covers torts arising out of the negligence of a government employee, specific exceptions are written into the statute. No claim is allowed that is based (1) upon an act or omission of an employee of the government who is exercising due care in the execution of a statute or regulation whether or not it be valid, or upon the exercise of or a failure to exercise a discretionary duty; (2) upon the negligent transmission of mail matter; (3) upon the assessment or collection of a tax or customs duty or a detention of goods by customs officials; (4) upon causes justiciable under the Suits in Admiralty Acts of 1920 and 1925; (5) upon an act or omission in administering the Trading with the Enemy Act; (6) upon the imposition of a quarantine; (7) upon an injury to a vessel while passing through the Panama Canal; (8) upon an assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; (9) upon the fiscal operations of the Treasury; (10) upon the activities of the military or naval forces during a time of war; (11) upon an act done in a foreign country; or (12) upon activities of the TVA.

Attorneys' Fees as Part of the Award

Any Court, agency or Attorney General is to include, as a part of the award, attorneys' fees which, if the amount recovered is $500 or more, are not to exceed ten per cent thereof or, if suit is brought, twenty percent of the amount recovered, to be paid out of the judgment, award or settlement obtained. Violation of the provision by any attorney is punishable criminally.

Exclusiveness of the Remedy Under the New Statute

Section 423 provides that after the date of the Act, the authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits cognizable under the Act. By Section 424 all provisions of law authorizing any federal agency to determine or adjust a claim are repealed, if the claim accrued after January 1, 1945.

The statutes repealed are specifically mentioned, but it is added that nothing in the Act shall be deemed to repeal any provision of law authorizing any federal agency to consider or adjust any claim not arising out of the negligent or wrongful act or omission of an employee of the government.

II. State and Municipal Liability in Tort

The present issue is no longer designed to prove the impropriety of the old rule which purported to discharge a societal obligation by throwing liability on a negligent but often irresponsible officer or body, but seeks to distribute effectively and justly the costs of official maladministration due to the inevitable consequences of human deficiencies in the operation of the governmental machine.[1]

The distinction between governmental and corporate activities of the State or city has been dissipated: (1) By the legislative expansion of liability for the defective care and maintenance of highways, streets, and sidewalks, essentially governmental functions; and (2) By the legislative admission that injuries inflicted through the negligent operation of publicly owned or operated motor vehicles should impose liability, regardless of whether the vehicle was employed by a municipal transportation system, a public supplier of gas or electricity, a garbage collector, a policeman, or a fireman.

However much agreement there may be on substantive community responsibility within certain exceptions, we are still far from agreement on the statutory expression of such liability and the procedural conditions on which it must be administered. The community has to demand protection against unfair and dishonest claimants. Some States, like New York and California, have exhibited great advances in tort liability and may well serve as models. The admission of liability for State activity is of comparatively recent origin, and in this respect New York, Michigan and Illinois appear to be in the vanguard.

During the last ten years, Committees of the Section of Municipal Law in the American Bar Association and of the American Political Science Association have studied the subject with a view to sound statutory change. The Committee on Public Administration of the Social Science Research Council has sponsored exhaustive investigations in several American cities. This experience is now available.

III. Statutes for State and Municipal Liability

The studies already made indicate that possibly five-sixths of community tort liability is already covered by the statutes or judicial law which admit municipal liability in the field of "corporate" activity, in the care of streets and sidewalks, in the management of public buildings and in the operation of municipally owned or commandeered vehicles.

These studies establish also that the bulk of the claims are small in amount. Most of them are either settled or withdrawn, and of those

1. For the text of reports of the Committee of the Section of Municipal Law in the American Bar Association, which reports discuss and annotate the subject in full detail, readers may apply to the Secretary of the Section.

which go to Courts only a relatively small percentage, if any, of the total claim is recovered. The gap to be filled relates mainly to governmental activity, police and fire administration, recreation and public education, public health and hospitalization, transportation facilities like airports, and similar public services.

It is debatable whether there should be separate Acts for the administration of State liability through a State board or Court, and for municipal liability to be administered by the city alone on its own responsibility. It is not known whether it is feasible to include both State and political subdivisions in one statute, to be administered under the supervision of a central State administrative board, with the State assuming some of the liability of the small towns beyond a certain amount. This is a practical problem, since small towns are likely to cause their representatives to vote against the assumption of community liability if they themselves are to bear more than a limited amount.

The Section's committee has drafted statutes after long deliberation, presenting certain alternatives between (a) State liability alone; (b) municipal liability alone; and (c) a limited joint assumption of the liability. Some of the questions considered by the Committee are as to whether the exceptions from jurisdiction shall follow the Federal Act; whether a jury shall be permitted or whether there should be an option; whether the standard of negligence or lack of due care is susceptible of definition; what is an emergency—important in California; whether the statute should assess liability in general with certain exceptions or work from the specific items to a wider plan; whether liability should always be based on fault or is some exception allowable, as in the case of the stray bullet of the policeman, the damage to parked automobiles from passing fire apparatus; whether contributory negligence should defeat a claim; whether the "comparative negligence" rule has any application; whether pain and suffering should be included as an element of damage, or should it be eliminated, as it is in Boston.

IV. Procedural Limitations as to Claims

In general, fairly prompt notice of the claim is necessary, whether prosecution follow or not. Some cities require notice within thirty days, and Massachusetts limits notice in "snow and ice cases" to ten days. Should the thirty-day period be extended by a Court or by city attorneys? Should the conditions attached to notice be applied strictly or loosely?

States differ in this respect, some holding that if the defect was not vital it should be waived. But there is no waiver of the requirement that notice must be filed within the statutory period. The claimant should, as in New York and Chicago, be compelled to submit to examination before trial, including a medical examination. In Chicago, an examination is a condition of settlement, which is permissible only after a suit has been filed. In New York a claimant for judicial relief must show that he has filed the claim and submitted to examination and that the Comptroller has failed to pay the claim.

Settlement of Meritorious Claims

There should be an opportunity to settle meritorious claims before suit and trial, but there is considerable difference of opinion as to who should assume the responsibility for such settlement. A large degree of responsibility in all cases is imposed upon the city attorney's office, either by way of recommendation or by way of authority to settle. In New York the Comptroller decides on the payment of claims, the law department coming into the case only after the Comptroller rejects. There is some opinion that the city council should assume responsibility for settlement. Perhaps the city attorney, as in Los Angeles, should have authority finally to settle only small claims at any stage of the proceedings, whereas large claims should be settled by the council upon advice and recommendation of the city attorney. The city attorney ought to consider himself a quasi-judicial officer, acting as much in the interest of the citizen as in that of the community.

Notice of the Defect Claimed

In addition to the notice of claim, notice of the defect is a condition of municipal negligence. A municipality has not ordinarily the facilities to watch hundreds of miles of streets and to detect promptly all of the defects that storms, etc., might create. It therefore is general law that the defect must be called to the attention of the mayor or city council or other appropriate official before a duty to repair, and therefore negligence from failure to repair, can operate. Nevertheless, Courts in many States have invented the doctrine of constructive notice by which an unsatisfactory condition of long standing may take the place of actual notice.

The time allowed for repair cannot be stated in a statute but must be designated as "reasonable."

California in 1936 developed a "minor defect" rule which materially limited the number of "sidewalk" cases. The rule was to the effect that when the defect is minor, it warrants the inference that there was an assumption of risk or that there was no constructive knowledge; therefore, recovery is not allowed. Yet cities differ in what they consider a minor defect. The "snow and ice" cases give rise to similar considerations. It is difficult to prove municipal negligence in failing to remove accumulations, so that some argument could

be made either for assuming or denying liability.

Liability in the Small Town

It appears that in small towns there is an indisposition either to make claims for accidents or to press them, and it is asserted that very often such claims are advanced only by outsiders. The questions arise as to whether the small town should be made wholly liable, whether an arbitrary limit on town liability per person should be set, whether a State bill should cover only the largest cities, and whether the town's liability should be limited with the balance assumed by the State. The New York law of 1941 appears to make no differentiation between cities, counties, towns and villages. A third bill presented by the Section's committee undertakes to limit the liability of small towns to a small percentage of the tax lists, with appropriate credit for accident prevention and efficiency in avoiding tort.

Municipal Insurance Against Liability

The experience of cities insuring themselves against liability is inconclusive. Actuarial experience is limited. In motor vehicle cases the city might benefit from small premiums. Nevertheless, in other cities the experience would indicate that over a long period, insurance premiums exceeded the amount of tort liability.

On the whole, experts seem to conclude that self-insurance is cheaper than premiums paid to private companies. The administration of tort liability is exceedingly important to reaching any conclusions. The administration varies greatly from city to city, even apart from financial considerations. The statute can furnish guiding lines but can set out only the principal safeguards.

V. Statutory Liability of the State

Four States have a constitutional prohibition against suing the State. Twenty-two permit suit in some form, and twenty-two seem to be silent on the subject. Yet the situation is not as sterile as it seems. Of the four States which prohibit suit, Illinois has nevertheless established a Court of Claims, permitting a petition even in tort; and another State has long established a Claims Commission to pass upon claims with recommendation to the legislature.

Among the silent twenty-two States, the legislatures often by special Act grant authority to sue in a given case, in States where special legislation is not constitutionally forbidden. This means simply that the claims are presented to the legislature and are passed upon by claims committees. Such claims run all the hazards of political claims generally. Whether justice is done is a matter of chance.

Even in the twenty-two States where suit is permitted, liability does not generally extend to tort claims. Yet this prohibition is not as absolute as it seems, for numerous States have adopted the Motor Vehicle Act or other Uniform Acts imposing liability.

In the three States which provide for judicial administration before a Court of Claims—Illinois, Michigan and New York—tort liability is usually included. In New York, the broadest of all, jurisdiction extends to all cases arising from the management of canals, defects in highways, the appropriation by the State of private lands, the elimination of grade crossings, erroneous payment of taxes, contracts with the State, and torts of State officers and employees. It is noteworthy that this broad liability has not cost New York an excessive amount.

Procedure for Settlement of Claims

Aside from the private bill or reference to the Court of Claims for the advice of the legislature, nine States have adopted an administrative settlement by a Claims Commission. Such a commission is likely to act more judicially than a legislative committee. While its findings are as a rule advisory only and a dissatisfied claimant can present his claim to the legislature or a Court, their finding is usually upheld. The cost of administration is trifling.

The administrative board, as formerly was the case in Michigan, and the State Board of Control, as in California, may play an important part in the administration of tort claims. It could unify the practice throughout the State, make small administrative settlements so as to relieve the Courts, institute uniform investigating methods, adopt uniform rules for preventing and reporting accidents, and in other ways effectively regularize the practice and administration of tort liability. Courts are preferable, as they are under the federal Act, but the progress in this respect is likely to be slow. Only a few States have established a Court of Claims.

The cost to the State of permitting suits in tort is relatively small, in all States which permit such liability. The Section's committee report gives the statistics of various States. From fifteen to eighteen per cent in the claims allowed, in relation to the amounts of claims advanced, appears to represent the experience of most States.

5

Federal Tort Claims Act:

Comments and Questions for Practising Lawyers

by Harold G. Aron • of the New York Bar

■ The enactment of the Federal Tort Claims Act, as a part of the Legislative Reorganization Act of 1946, was "a stupendous break with a very ancient past". That "The King can do no wrong" ceased to be law of the land. The new statute is having many consequences, and is creating many problems, for lawyers and their clients, throughout the United States.

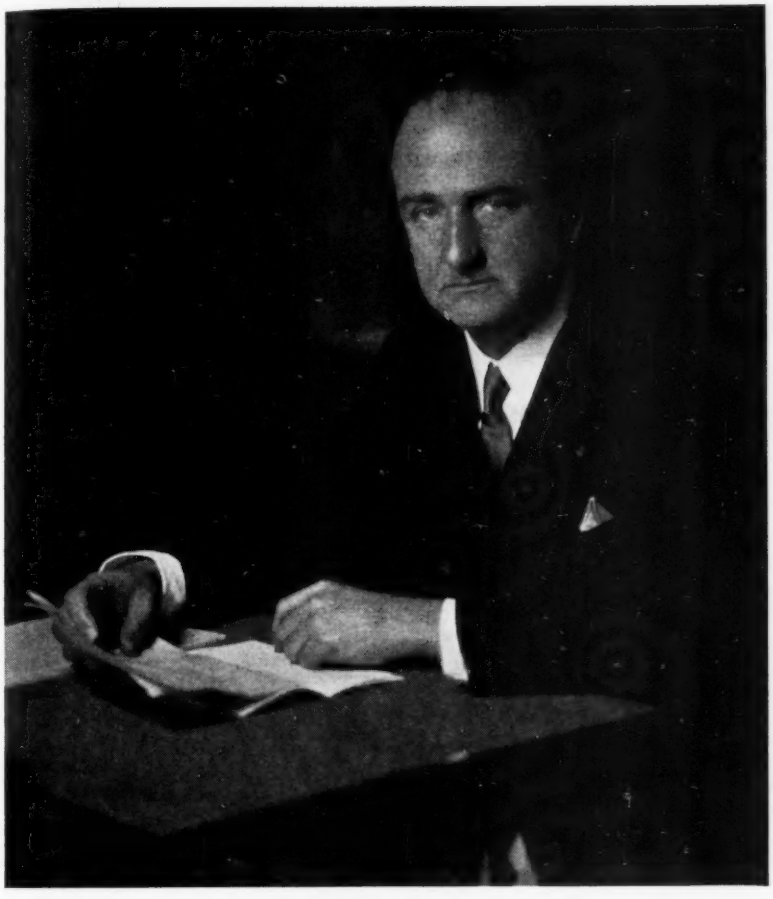
In fulfillment of our function of giving to our readers prompt and useful information as to new legislation and its effects, Former Congressman Aaron L. Ford, of the Mississippi and District of Columbia Bars, wrote for our November issue (page 741) an authoritative article on the Legislative Reorganization Act, to which he had had a relationship. At page 744 he discussed the Federal Tort Claims Act. In our present issue, Professor Borchard, of the Yale Law School and the Section of Municipal Law, gives a further analysis of the latter statute, and also surveys the present situation and proposed legislation as to the liability of States and municipalities.

To the foregoing we add trenchant comments on the new federal statute, by Harold G. Aron, of the New York Bar. He poses many practical and challenging questions, from his long experience. Mr. Aron was born in Brooklyn, was graduated from Hamilton College and the New York Law School and was admitted in 1908 to the New York Bar, of which he has since been a member in active practice. During 1911-19 he was a Professor of Law at the New York Law School. From time to time he has been a special counsel for various federal and State boards, officers and agencies, including the Shipping Board and the Attorney General. He is the author of several books as to the law of evidence and of real property. Practising lawyers may find help in some of the questions which he raises.

■ Professor Borchard's paper seems to me to make a valiant attempt to cover a broad field of subjects which are not cognate in origin, theory or practice. To treat them together seems to me to leave a blurred picture where his outstanding legal scholarship would have been of great value in etching what is a dramatically far-reaching development in Anglo-Saxon Law—comparable in significance, in the light of the trend of political economy, with the abandonment of trial by ordeal.

The barrier which precludes treating together the subjects of "tort claims against . . . municipal, State and federal governments" is the varying type of political sovereignty, if it may be so called, which is involved when one deals with wrongs wrought by the United States of America, by the several States of the Union, and by municipal corporations. Under our Constitution, the United States is a sovereign in an extremely limited sense, as far as municipal law is concerned; and none of its Courts have any inherent jurisdiction. The States, on the other hand, subject only to specific limitations of their own acceptance under the Federal Constitution, are truly sovereign in their domains; and their Courts possess inherently all of the judicial powers which have accumulated and vested over the centuries of Anglo-Saxon jurisprudence. Municipal corporations, as mere creatures of the State, have of course no sovereignty; they possess only such arbitrary powers as the State may, again within its own constitutional limitations, delegate. The transitions and developments with which Professor Borchard deals stem from the hardships which grew out of the concept, expressed in the maxim, "The King can do no wrong", but their rationale is quite independent and different.

The enactment by the 79th Congress of the Federal Tort Claims Act (Public Law 601), coupled with the very recent official statement by the Lord Chancellor of England that the Crown is about to give up its legal immunity from suits in tort and con-



HAROLD G. ARON

tract, marks an historic milestone in the Anglo-Saxon law and reveals again the graceful flexibility of Our Lady of the Common Law in meeting changed conditions through the centuries. Withal, it is a strange compound which lies behind this far-reaching change in the two countries; and the fact that they are contemporaneous is not an historical accident, if such there ever be. To the Lord Chancellor, the doctrine that "The King can do no wrong" is a "survival that should be swept away"; and the Senate Committee which reported the Federal Tort Claims bill said, cogently and succinctly and more to the point (Senate Report 1400), as to the Government's exemption from actions "with respect to any common law tort," that "its only justification seems historical."

History of Private Laws as to Claims

Some future historian, if he digs deep enough, may opine that the proximate cause of the Federal Tort Claims Act was the long-existing and troublesome practice of private laws, relief bills and Committees on Claims, which the Act abolishes, although in practice this abolition has merely resulted, thus far, that relief measures are routed to the Judiciary Committee of the House and to the Finance and other Standing Committees of the Senate which have survived the Reorganization Act. A careful reading of the Federal Tort Claims Act will reveal adequate "escape clauses" to preserve, when needed, all the prior prerogatives of the Congress as to relief bills, private laws and claims against the United States, and that what Congress really did, and wisely, was to dump a load of troubles on the federal Courts, without surrendering any of the powers it had when the first relief bill was introduced and became a private law in 1790.

Presidents since the days of Adams and statesmen since the time of Senator Brodhead have railed against the practice of relief bills and private laws; but it was not until 1855 that the Court of Claims was created, with its powers somewhat broadened twenty years later. At no time until President Truman affixed his signature last August 2 to the Act to reorganize the Congress could an American citizen sue his Government for its wrongdoing, if it went beyond a breach of contract or some specific Act of Congress. Yet as long ago as 1884, the United States Supreme Court, in *Langford* v. *United States* (101 U. S. 342) had said, as to the doctrine that "The King can do no wrong" and was immune from suit, that "neither in reference to the Government of the United States or the several States, or any of their officers, the English maxim has an existence in this country."

Nevertheless every Congress, before and since that decision, has been burdened and cursed—as many conscientious Members have felt, and there have been many—with thousands of relief bills seeking sanction as private laws, because the United States could not be sued for its wrongdoing, even when a negligently driven mail truck permanently injured an innocent child or killed the breadwinner of a household. In the last twelve Congresses, approximately 16,000 relief bills on behalf of such private claims have been introduced, of which about one in ten has been enacted into a private law. Not a few of them have been extremely private.

New Statute Means a Vast Volume of Litigation

The sheer volume of new litigation which the Federal Tort Claims Act will generate and force upon the Courts of the United States, their judges, and the law officers of Government, puts a duty squarely upon

the shoulders of the legal profession; and it seems to me regrettable that the New York State Bar Association should have seen fit to publish an attack on its provisions limiting the fees of attorneys, under the caption "Enchaining the Lawyer" (Letter No. 113; October 30, 1946). In debates on the floor of the House of Representatives, when previous attempts were made to pass this salutary legislation, bitter things have been said against the Bar, as, for example, that:

> We must remember that the American Bar Association is composed of lawyers and that lawyers are prosecuting claims, and that lawyers want to get the law into the position where they can most readily and practically represent their clients. It is urged as a conclusive argument in favor of it, that the Bar Associations of the United States are behind this bill. Of course, they are. The bill opens up a tremendous new field of litigation. When the bill passes, the actions against the Federal Government will be multiplied by tens of thousands. The bill ought to be labelled a bill for the relief of lawyers in general and ambulance chasing lawyers in particular. Every one who stumbles on the post-office steps or who slips or falls in this Capitol Building or who is injured, in any way, in the national parks or the national forests, is going to run to his lawyer and bring an action against the Government. I make a prediction that in addition to its being an invitation to ambulance-chasing lawyers, it will be a direct invitation to district attorneys and their deputy district attorneys to make easy settlements in favor of those whom they owe some political obligation.[1]

Many New Problems Are Created for Practitioners

Whenever the law breaks with the past by positive legislative action, no resulting statute springs "full-armed from the brain of Jove." The Federal Tort Claims Act has flaws, ineptitudes and ambiguities, which can be troublesome. It is to be hoped that the Bar will show a degree of self-discipline which will negate and stultify such accusations as those I have quoted.

The new law is a stupendous break with a very ancient past, due, chiefly and realistically, to the fact that, as was said of the Senate Committee which reported it *(supra)*: "With the expansion of government activities in recent years, it becomes especially important to grant private individuals the right to sue the Government in respect of such torts as negligence in the operation of vehicles." This is a classic of understatement, of oversimplification, and of using language to conceal thought. It would have been more disingenuous to have said: "On account of Marxian socialism, the New Deal and the results of incipient communism", and to have recognized the fact that the range of the new statute is as wide as the substantive law; that the procedural questions which it raises are as far-flung as the adjective law, and that the problems of proof as intricate as any aspect of the probative law.

For example, practitioners are already wandering in *terra incognita*, not even certain as to how to designate the United States as a defendant. One action already begun describes the defendant as a *sovereign corporation*, a combination of only two words that will excite the mind of any legal scholar and perhaps prompt dozens of law review contributions.

Practical Questions Under the New Act

To mention a few of the problems, already being faced, in litigation begun or about to be begun under this new Federal Tort Claims Act: Are admissions against interest by Presidents, Generals of the Armies, members of the Cabinet, and lesser government officials, competent evidence in proving a claim, where the rights of the inventor of the long-distance telephone were sold to France by the United States Government, without his knowledge or consent or compensation to him? Are statements of Secretaries of State, Ambassadors and other foreign envoys admissible, where an American exporter was swindled by the Imperial German Government and the negligence of the Government of the United States? Are statements made by official American agents before Mixed Claims Tribunals eligible as evidence, where an old lady lost her all by failing to leave attached to her German bonds the coupons, when she presented her claim against Germany under the Settlement of War Claims Act after the last war?

Au contraire, are the self-serving declarations of officials and bureaucrats of the United States Government admissible against a plaintiff who sues under the Federal Tort Claims Act? Can there be, as against the United States, an examination before trial or its equivalent? Has *any* District Court jurisdiction under the Act, where it is proper or necessary to join a Cabinet officer or other public official, or does the old rule apply that all such actions must be brought in the District of Columbia? Then, too, there is this magnificent question, which arises in litigation already on its way to the Courts: Does a breach of trust, express or constructive, such as arose, on the part of the United States, under the Settlement of the War Claims Act, as to unpaid holders of awards of the Mixed Claims Commission (United States and Germany) sound in tort under the new law as it does basically and philosophically?

Is the Remedy Under the New Act Exclusive?

Again: Is the remedy under this Act exclusive, despite its language, where the wrong sued for emanates from the operative effect of an Act of Congress, or is there also a remedy in the Court of Claims under the Tucker Act, despite the fact that the action originates *ex delicto*? When does the Statute of Limitations prescribed in the Federal Tort Claims Act begin to run, where the tort is, as it may be and is in some pending litigation, conversion and fraud? Does the doctrine of *res ipsa loquitur* apply, under this new law, and to what extent does the settled substantive law of principal and agent apply to a defendant (the United States) with two million employees? Naturally, as in any initial legislation, covering so broad a field, the language of the new Act is inadequate, when it comes to its saving clauses and exceptions.

1. *Congressional Record*, for September 12, 1940; pages 18207-18226.

Years of Litigation to Define Major Questions

There are major questions raised by the language of the Act which can be delimited and defined only after years of litigation and judicial decision. What, in the sweeping language of the Act, are the rights of a citizen in the United States Court sitting without a jury and with power to adjudicate "any claim against the United States, for money only . . . on account of damages to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office under circumstances where the United States if a private person would be liable to the claimant for such damage, loss or injury or death in accordance with the law of the place where the act or omission occurred" (Section 410, Public Law 601). If the distinguished Editor-in-Chief of the JOURNAL runs out of material in the next five or ten years, he will find plenty of "copy" in seeking to bring within accepted legal meanings this pregnant recital of the scope of the Federal Tort Claims Act and the phrases used in connection therewith or contained therein, such as "common law tort" (are there others?), "fiscal operations of the Treasury", "regulation of the monetary system", "interference with contract rights", "combatant activities of the military and naval forces", "claims arising in a foreign country", etc.

Some years ago the Chancellor of what then was Hungary, speaking in this country, said of the administration of the law *in gene ral*: "I say we are trying. We are having great difficulty, either not fully comprehending what justice, equity and established law mean, or in shaping a course of public and private action in accord with them and the ideals they express." *Mutatis mutandis*, much the same may be said of the new Federal Tort Claims Act.

We shall better understand this new law, if we look back a few hundred years. For, as Matthew Arnold said: "The largest part of that history which we commonly call ancient is practically modern, as it describes society in a stage analogous to that which it now is, while, on the other hand, most of what is called modern is practically ancient, as it relates to a state of things that has passed away."

The maxim that "the King can do no wrong" has passed away. History is stubborn, yields slowly and painfully, as one is aware in looking over the scores of volumes of learned dissertations in the Congressional Library on the subject of the divine right of kings, from which this maxim emanates. The implications of the abandonment of this doctrine in the United States and England are too great to deal with adequately within the confines of a monthly journal, however outstanding the writer may be, as is Professor Borchard, for the subject goes back a very long way.

Shortly after James I came to the throne of England in 1603, he announced that "the state of Monarchy is the supremest thing on earth"; and his royalist followers, while some of our ancestors were planning to make the great pilgrimage to Plymouth, agreed that "monarchs are divinely sanctioned to rule, deriving all authority from the Deity and none from the governed". Consonant with this doctrine was the generally accepted view that the King was the fountain-head of all justice, and out of that grew what we now call Courts of Equity, as distinguished from Courts of Law, and a quite independent system of jurisprudence which put "the King's conscience" above the law and gave rise to the great powers of what is today the highest judicial position in the world, the Lord Chancellorship of England. With these concepts of royal and indisputable power and righteousness, there developed the maxim that "the King can do no wrong."

How Far Has the United States Gone?

And now we of the Bar and our austere and distinguished brethren on the bench must ask ourselves whether, in the Federal Tort Claims Act, the United States has gone, to the extent of its sovereignty, the full distance of agreeing to shed its imperial robes, step down off its throne, and submit itself to the normal processes of the administration of Anglo-Saxon justice? One would think that the framers of the Federal Tort Claims Act had never heard of the time when the throne of England called in its janitor, for such is the origin of the word Chancellor, and told him to lessen the hardships of the law courts and thus created equity jurisprudence. Law in its generic sense, consists of more than actions *ex contractu* and *ex delicto*. Does the Federal Tort Claims Act cover such cases, of which there are many, where the federal government, in its old and new sprung powers, has caused loss and ruin, but within the technical mandates of the law; or does the new statute mean what was pretty well said in the Illinois statute, accepting its liability for wrongdoing to its citizens thirty years ago by establishing a Court of Claims with jurisdiction to hear all claims both legal and equitable "which the State as a sovereign commonwealth should in equity and good conscience discharge"?

It is not a simple thing to activate accurately and justly this new Federal Tort Claims Act and radiate its rationale to State and municipal government. It seems to me to need a John Marshall to construe and interpret it, with the sympathetic aid of a Bar that has not forgotten that ancient legal ethic of Anglo-Saxon jurisprudence, quoted by Gilbert in these words:

> But a Counsellor cannot have this or any other action (against his client) to obtain pecuniary Consideration for his Advice; the Law of England concurring on this point with the Delicacy of the Roman Law, in not permitting a Price to be affixed to the performance of this honorable Duty in which so many and arduous questions must arise, where the spontaneous Acknowledgment of the Client can alone be adequate.

6

Collectivism's Rising Tide:

Lawyers Must Save "Freedom for People"

by Joseph C. O'Mahoney • of the United States Senate

■ The 80th Congress is not yet one month old, but there have already been introduced in the two Houses thirty bills increasing the powers of the Government at Washington. These measures have been sponsored by members of both political parties, and are defended by their authors as absolutely essential in the public interest.

One of these bills, introduced by a Republican Representative, would establish the Office of Power Administration. Another, introduced by a Democratic Representative, would establish a Water Pollution Advisory Board in the Federal Public Health Service. A Republican Senator introduced a bill to create a new Department of Peace. A Democratic Senator introduced a bill to establish a Federal Transportation Authority as an independent agency.

Some of these bills deal with matters that are clearly National in scope. Others deal with matters that are purely local. All of them, if enacted, would make big government bigger. This is taking place within three months of a National election at which the people of the country, in unmistakable terms, let it be known that they wanted, not more government, but less.

What is the explanation of this steady drift toward central govern-

---

■ Plain speaking and grave concern for the future of our country characterize Senator O'Mahoney's message to the lawyers of America. He sees a rising tide of collectivism, in the United States and in the rest of the world—not yet as ascendant here—with America as the last stronghold of the system of private enterprise under law-governed regulation of its abuses. Government grown big and bureaus becoming absolute because judicial review is denied, business units grown large and inimical to the projects of small amounts of venture capital, labor unions grown powerful and irresponsible because left free of the curbs to which business units are subjected—these he groups together as manifestations of a Marxian trend, which is revealed also in the thinking and the actions of some leaders in such aggregations of power. He has set his face like flint against all of these abuses and trends. Courts and legislatures which withhold the substance of judicial review of agency directives are looked on as aids to the totalitarian trend.

Prepared and somewhat condensed from the manuscript of the Wyoming Senator's address before the New York State Bar Association on January 25, this article is a thoughtful and significant contribution to the philosophy respecting public regulation of private enterprise as well as the limitation of arbitrariness in "big government". Senator O'Mahoney has been long and actively interested in federal administrative operations, the control thereof, and particularly the preservation of State and local government. He was an active member of the five-man subcommittee of the Senate Committee on the Judiciary which conducted the 1941 hearings on the Administrative Law bills growing out of the report of The Attorney General's Committee on Administrative Procedure. World War II interrupted and suspended that work. Senator O'Mahoney continued his personal activities in the field. Writing in the August 1943 issue of *Forbes Magazine*, he said:

> Policies are no longer being planned and carried out by the people or their representatives, but through Executive Order by employees of the Executive arm of the Government . . . Secrecy . . . stamps the whole procedure . . . Executive orders have even set aside the Courts and the citizen's right of judicial appeal . . . These things . . . are dangerous because they are setting the pattern for our future. That is the pattern of arbitrary power, the characteristic mark of totalitarianism . . . It is the road to National socialism where such arbitrary concentrated power becomes the master of the people.

During the following year he wrote a series of six articles for the Scripps-Howard newspapers on planned economy, pressure groups, States' rights, private capital, "how to manage the managers in the public interest", etc. As a member of the Sen-

HONORABLE JOSEPH C. O'MAHONEY

ment, and what are we going to do about it? These questions must be answered by the people of the United States if we are to preserve the system which we so automatically call the American way of life.

The American lawyer, with a great tradition of public service behind him, has an opportunity now to do for the people of the United States and the world what was done for the people in 1787 by the lawyers who made up the majority of the convention which drew the Federal Constitution. Of the fifty-five delegates who attended that immortal session, thirty-four were lawyers. Ten of them had been judges, and they all went to Philadelphia not to serve the interests of groups or classes, or even geographical sections. They went there in the interests of all.

When these men drew the preamble of the Federal Constitution, they were not thinking in terms of special groups or of class government. They were thinking in terms of the people as a whole. They were thinking of justice for people. They were thinking of "domestic tranquillity," of "the common defense," and of "the general welfare." They sought to build a government that would, in their language, "secure the blessings of liberty to ourselves and to our posterity." They were thinking, therefore, of individuals. They were thinking of the men, women and children who at that time con-

---

ate Committee on the Judiciary and an influential leader in the then Democratic majority in the Senate, he took an important part in the enactment of the Administrative Procedure Act. He has shown a continuing interest that this legislation shall accomplish fully its declared objectives, despite resistance by the agencies and bureaus it was designed to curb, and that the Act shall be strengthened as fast and as far as experience or agency attitude show the need.

Senator O'Mahoney did not suggest specific measures to resist and defeat "the rising tide of collectivism" in our country. He submitted that task to American lawyers, the successors of those who devised the constitutional system of checks and balances which the collectivist school of thought and action now endangers. He portrayed the crisis but did not point the means of overcoming it. Perhaps he meant in his present message to say only, with the old text: "Think on these things".

The basic problem seems to be that stated on pages 4-5 of our January issue. If it is sincerely desired to de-centralize "big Government" and restore powers and duties to the States and localities, a start must be made, insistently and earnestly, at every practicable point. If the private enterprise system is to be liberated to do its job for freedom and opportunity for our people, hampering controls must be taken down, not retained, still less increased. Open or covert advocates of a collectivist or regimented economy have much to gain from a continued paralysis and stifling of private enterprise, at the hands of Government agencies and labor organizations which have power without accountability. Taxes that throttle enterprise, controls that give enterprise no chance to get going, agencies that ham-string and harass with no right of the aggrieved to resort to the Courts for protection, unequal laws that bestow unbridled powers on favored "pressure groups" and operate punitively against citizens generally, Government spending that places insuperable burdens on future years and leave American politics at the mercy of an unneeded horde on Government payrolls—these are some of the obstacles which must be overcome by those who wish to resist and defeat "the rising tide of collectivism" in America.

stituted, and who in all the days to come would continue to constitute, the people of this great Nation.

If we who are the lawyers of this generation, following in the footsteps of these, our great predecessors, are to preserve the ideal of government they cherished, we shall have to begin by re-dedicating ourselves to the great cause in which they served; namely, the cause of freedom for people. And our first task will be to determine why it has come about in our generation that the principles of popular government have been giving way steadily to the principles of authoritarianism.

I know of no nobler task to which the modern lawyer can dedicate himself than this. The rising tide of collectivism threatens to engulf the whole world. It will engulf us here if we do not understand the cause and go immediately about the task of applying the remedy.

A Challenge to the Modern Lawyer

Centralism in government has markedly increased in our time, not alone in the totalitarian states, but in countries like Great Britain and this, where people are still loyal to the principle of popular sovereignty. It was a British lawyer who several years ago wrote a great book on the development of administrative law under the title, *The New Despotism*. He used the word "despotism" because he recognized that government bureaus tend to develop arbitrary powers. The same theme was adopted here by a great American lawyer, who was also a member of the House of Representatives, in a volume which he called *The Wonderland of Bureaucracy*. Both of these books were written long before the New Deal, a fact which I casually mention in order that it may be clear that the development of centralism in the United States is not to be charged against any particular party or individual. Administrative bureaus in Government, more of which are being suggested even now by the members of the 80th Congress, like national labor unions, are the result of the appearance of national and international business corporations. Indeed, it is not too much to say that the modern business corporation is the most significant single social institution of our time...

Public comprehension of the nature of the modern corporation has been slowly taking form. As long ago as 1929, President Herbert Hoover established a special research committee on social trends. The chairman of that committee was the distinguished economist, Dr. Wesley C. Mitchell, under whose editorship a report was published during the closing year of President Hoover's administration.

One of the most significant chapters of this work was written by Dr. Charles E. Merriam, who compared the economic power of certain corporations with the economic power of states and cities, as measured by their revenues and the number of their employees.

This chapter showed that in 1930 New York City, which enjoyed the largest gross revenues of any political organization in the country except the federal government, actually had smaller gross annual receipts than the Pennsylvania Railroad System, General Motors, the Great Atlantic and Pacific Tea Company or the United States Steel Corporation. . . .

In 1942 the State of New York had reached a higher rank in terms of revenue than the City of New York by about $6,000,000 ($720,306,000 for the State as against $714,653,000 for the City). Yet it was still outranked by corporate giants...The modern industrial corporation has become so great that it can match resources even with governments. . . .

Creatures of Man and Creatures of God

To think of such organizations as though they were individuals is a fundamental error out of which stems much of the confusion that makes our age so turbulent. Although the modern industrial organization is actually more like a government than it is like an individual, we treat it as though it were an individual. We think of it as having the privileges and rights of an individual, whereas every lawyer knows that a corporation is a creature of man, while man is a creature of God. No corporation can come into existence save by the permission of some government. But man makes the government which makes the corporation. . . .

Failure to comprehend this distinction and to provide the rule of order by which the modern economic state shall be made, as the political state was made by our Federal Constitution, a servant of the people, has led directly to the appearance of totalitarianism.

When the business and political leaders of Europe failed to solve this, the greatest question of our time, and the people of Europe were unable to support themselves because they no longer had control of the economic instrumentalities by which the modern world lives, they turned to central government for relief. They listened to the false preaching of Lenin, Mussolini and Hitler, and gave to the political state arbitrary power over themselves as well as over the economic system, with the appalling results that were written in the blood of thirty-four million people from 1939 to 1945.

Some of us act now as though World War II were like last year's Army-Navy football game, a contest that is over and done with. We seem to cherish the fond hope that we can revert to some vague "normalcy" and go on about the business of living without coming to grips with the underlying cause of the modern crisis. This cause is the fact that we no longer are living in a world of individuals, but in a world of organizations, and that there can be no solution of our problem until we find a rule by which these economic organizations, whatever they are—corporations, trade associations, labor unions, organizations of consumers, pressure groups of every kind—may live together in understanding and mutual helpfulness for the benefit of all the people.

One of our mistakes has been the effort to proceed by way of punishing abuses instead of encouraging the obvious good that proceeds from modern industrial organization. There are abuses to be sure. There are corporate abuses and labor union abuses. Racketeers in their time have sought to use both types of organization for narrow and selfish personal ends rather than for the public good. But despite these blotches upon the body of modern economic organization, no one can doubt that both the corporation and the labor union have been productive of definite social benefit. The modern world would be impossible without them.

Today's Need—A New Rule of Order

It would be just as great an error to try to destroy the labor union as it would be to try to destroy the corporation. We can not go back to the time when our economic life was the product of the capital and labor of a few men under a system whereby the worker could talk personally with his employer, and both could move on to new geographic frontiers when dissatisfied with the conditions they were enduring. The frontiers of this generation are in the field of technology and science, the great blessings of which can not possibly be developed for mankind except through economic organization. It follows, therefore, that we have no alternative but to write a rule of responsibility for the new social institution which is the mark of our time, the organization, corporate or otherwise, by which groups of men act together. If we believe, as the lawyers who wrote the Federal Constitution believed, that the people are the source of all authority that may be exercised over them, then we can not possibly be willing to endure a condition by which a handful obtain the power to wield these modern agencies, and the masses are compelled to endure whatever conditions may be imposed upon them.

Big Business, Big Labor, Big Government

We must open our eyes to the fact that the large corporation, the national labor union, and the Government administrative bureau, are all aspects of the same development. The large corporation was necessary because otherwise mankind could not use the great instruments invented by genius and discovered by science. The national labor union was necessary because otherwise the workers, who could no longer negotiate with the owners of the enterprises for which they labored, would have been unable to safeguard their just interests. The Government administrative bureau was necessary because, as the new economic organizations spread beyond local boundaries, crossing mountains and rivers and spanning the whole country, it was no longer possible for local governing authority to regulate them in the public interest.

Thus the powers of the city and the State have been steadily diminishing, while the power of the central Government has been steadily expanding. As it expands, collectivism spreads from the economic sphere to the political sphere. We see it all around us. We see political collectivism stretching out to embrace all Europe. We see Socialism taking over the government of England. We see great industrial enterprises taken over by the government of Great Britain. We know that of all the great Nations of the world, only the United States still adheres to a belief in the capitalistic system. If it is to survive, then it follows that we in the United States must make it survive. That, I think, is the task of the lawyer—the lawyer whose function has always been to make as well as to interpret the rule of social order. The lawyer fills our legislatures and our Congress, just as he filled the Constitutional Convention; and if the modern lawyer believes as his predecessor believed, that the people are the sovereign masters, then he will undertake now to help save the capitalist economy by helping to write the rule under which the managers of all modern economic organizations are made responsible to the people.

This rule can only be written by the Congress of the United States, which in the Federal Constitution was given explicit power to regulate all commerce among the States and with foreign nations in the interests of the whole people for whom that Constitution was written.

The National Association of Legal Aid Organizations

■ The newly elected officers of the National Association of Legal Aid Organizations, which recently held its twenty-fourth annual meeting are: Honorary President, Honorable Frederick M. Vinson, Chief Justice of the United States; President, Murray Seasongood, of Cincinnati; Vice Presidents: Raynor M. Gardiner, Boston; Carl B. Rix, Milwaukee; Reginald H. Smith, Boston, and Harrison Tweed, New York City; Treasurer: Wayne Theophilus, Pittsburgh, Pennsylvania; Secretary, Emery A. Brownell, 25 Exchange Street, Rochester 4, New York; Executive Committee: Arthur Harvey, Albany; George Silverman, Cincinnati; Paul F. Irey, Denver, Colorado; Louis Miriani,, Detroit; John K. Rickles, Indianapolis; Julia B. Dolan, Milwaukee; George Scott Stewart, Philadelphia; Charles E. A. Knight, Richmond, Virginia; and Allan Fisher, Washington, D. C.

7

Dean Roscoe Pound

To Retire from Teaching

■ A host of friends throughout the United States and the world will receive with regret the announcement made by Harvard University that Professor Roscoe Pound, beloved former Dean of the Harvard Law School, will retire from its faculty on June 30, with the title of Professor Emeritus.

Work on the Frontiers of Knowledge

His retirement will terminate thirty-six years of active service on the Harvard faculty, during which time he served as Story Professor of Law (1910-1913), Carter Professor of Jurisprudence (1913-1917), Dean of the Law School (1916-1936), and University Professor (1936 to date). In the latter position, Dean Pound was appointed to "work on the frontiers of knowledge" without regard to department lines. He lectured on the history and system of Anglo-Saxon law, on the Latin philosopher Lucretius, and on the sociology of law, and also conducted a legal seminar in jurisprudence.

In honor of his seventy-sixth birthday last October, learned friends of Dean Pound published in February a readable volume of *Interpretations of Legal Philosophy: Essays in Honor of Roscoe Pound.* It contains writings by leading legal scholars in all parts of the world, to form a commemoration of the dean of them all. Former President Arthur T. Vanderbilt, of New Jersey, reviews this work appreciatively, in "Books for Lawyers" in this number.

The cover portrait of our March issue in 1946 was of Pound, and the accompanying sketch (pages 133-134) was in expression of the world-wide esteem of lawyers and legal scholars, as well as of the public, whose interest in an improved administration of justice and in the maintenance of the rights of persons and property to protection and redress against arbitrary actions by governments or irresponsible aggregation of power in private hands he has defended so long and so often and at such sacrifice of leisure and risk of health. The bestowal of the American Bar Association Medal on him in 1940 was in token of his innumerable services—many "conspicuous" and many unheralded and unchronicled—to American jurisprudence.

A Notable Career of Teaching

Without repeating here the encomiums of our recent sketch we mention here that before coming to Harvard, Pound had taught law at the University of Nebraska, at Northwestern University, and at the University of Chicago. He had served as Commissioner of Appeals of the Supreme Court of Nebraska, and had become the Dean of Law at Nebraska University when he was 33. He was Director of the Botanical Survey of Nebraska from 1892 to 1903. Pound was born at Lincoln, Nebraska, on October 27, 1870, and was graduated from the University of Nebraska in 1888 and from Harvard Law School in 1890.

The affection and admiration of a grateful profession will go with him in his retirement, with the earnest hope that he may have many long years of enjoyment of leisure which he so richly earned and so constantly rejected.

A Vivid Tribute to a Great American Juriconsult

The *Time* Magazine, in its issue for February 24, had this to say of America's beloved Roscoe Pound, entitled "Man With A Memory":

"In his cluttered office in Harvard's Langdell Hall an old man wearing a green eyeshade was turning the pages of a new book. The old man looked liked a cross between Owen Wister and Rudyard Kipling. His name was Roscoe Pound. The book looked heavy. Its title: *Interpretations of Modern Legal Philosophies: Esssays*

in Honor of Roscoe Pound. Dean Roscoe Pound, doing his best not to to look too pleased, said, 'A man is entitled to have his head swell a little over that.'

"The book had come just in time to cap a long career. Last week Roscoe Pound announced that after 48 years of teaching (37 at Harvard), he would retire in June. He had stepped down as Dean of the Harvard Law School in 1936 to become the first of the University's 'roving professors.' Now, after eleven years of teaching whatever he liked, from sociology to Lucretius, he was about to give up that pleasant job too.

"With his retirement, Harvard will lose not only a great teacher but one of the top U.S. authorities on jurisprudence. His admirers say that he has revolutionized the teaching of law; his detractors agree that he has but wish he hadn't. He was the first to systematize what was only a vague stirring in men like Justice Oliver Wendell Holmes and German jurists: the theory that law must look to the world around it as well as to its codes. He did much to change the accent from fixed rules (analytical jurisprudence) to social needs (sociological jurisprudence).

"In Pound's time, Harvard Law shifted from a school that mostly turned out private barristers and corporation lawyers with broad-A accents, to a training school for government lawyers too. The growth of administrative law and the spread of governmental bureaus and commissions made plenty of jobs for this new kind of graduate. Pound hoped they would help write good laws; he was not a man who wanted courts to invade the functions of legislation. Only last week he cracked out publicly against 'judges today [who] attempt to be statesmen and interpret laws without guidance by the intent of those who enacted them.' His dictum: 'Law must be stable, and yet it cannot stand still.'

" 'The secret of my success,' Roscoe Pound once wrote, 'is my blame memory.' As a boy in Lincoln, Neb. (he was the son of a local judge), he used to disrupt Sunday school classes by rattling off a chapter of the Bible after only one reading. After graduating from the University of Nebraska at 17, he studied and practiced law, found time to take a Ph.D. in botany and direct a botanical survey of Nebraska (there is a *roscopoundia* lichen).

ROSCOE POUND

"His 20 years as dean were the Harvard Law School's golden age. His faculty was famed: a volatile compound whose ingredients included the conservatism of the late Edward H. ("Bull") Warren, the New Dealism of James Landis and the confused leftism of Felix Frankfurter. Harvard turned out squads of bright and earnest lawyers who wrote or administered much of the early New Deal legislation (among them: Thomas Corcoran, David Lilienthal, Dean Acheson). Its postgraduate courses were the best in the U.S. Dean Pound's standards were high; and his customary greeting to incoming classes— 'Gentlemen, take a good look at the persons seated on either side of you, for one of you will not be with us next year'—has become legend.

"At 76, Pound still rises at 5:30, lumbers into his book-lined office promptly at 7. There he works with his nose almost touching the papers before him. His desk is piled so high with books that he and his secretary, mutually invisible, have to shout at each other.

"Pound is retiring, but not stopping work: he is finishing another book on jurisprudence (his 17th), is busy on a plan to reorganize China's judicial system for Chiang Kai-shek. Of his decision to stop teaching, he says: 'It is best to retire before people begin wondering why you don't.' "

8

International Law:

Plans Are Made to Aid Its Development

■ "Assistance to the progressive development and statement of international and world law" was declared by the unanimous Report to the House of Delegates on February 24, by the Committee for Peace and Law Through United Nations, to be "one of the most important, probably the most important, projects in which our Association has ever enlisted and could engage." The Committee's Report, on which the House took action, stated further that "In the long run, the future of international and domestic law, of free republican institutions, of the lives we lead and the profession of which we are members, depends on the supremacy of law, justice and a juridical order. Unless law and adjudication can be put firmly in the place of force and aggression in the world, the American economy, our way of life, and our institutions of justice and constitutional government, cannot long survive the regimentation and mobilization of our country for constant readiness to withstand totalitarian inroads and aggressions. In whatever American lawyers do to promote the supremacy of law in the world, we need have no higher motive than self-interest and self-preservation, for we are in fact laboring to defend and perpetuate the institutions and the independent profession which we cherish".

The unanimous Report of the Committee described the work and plans under way for the cooperation of the Canadian and American Bar Associations in rendering whatever assistance they can to The United Nations and its General Assembly in "the progressive development in international law and its codification". The Committees in charge for the two Associations have already begun their work. The House of Delegates on February 25 gave its unanimous approval and support to the submitted plans.

■ The House of Delegates at its midyear meeting in Chicago on February 25 adopted unanimously the following Resolutions recommended by the unanimous Report of its Committee on Peace and Law Through United Nations:

RESOLVED, That the General Assembly of The United Nations having implemented the obligation laid on it by Article 13 (a) of the Charter to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification, and having created a Committee to study, with the aid of the Secretary-General, and report as to the methods of carrying forward such work and of "enlisting the assistance of such national or international bodies as might aid in the attainment of this objective", the American Bar Association respectfully expresses to the Committee of the General Assembly the readiness and the purpose of this Association to join with the Canadian Bar Association in giving all desired assistance to the Committee; and

RESOLVED FURTHER, That the American Bar Association authorizes and instructs its Special Committee for Peace and Law Through United Nations, under the direction of the President of the Association, to continue its cooperation with the Canadian Bar Association and other organizations in behalf of the statement and strengthening of international law as rules to control and govern the rights and duties of Nations, their conduct, and their relationships: that the Section of International and Comparative Law shall take part and assist in the work so undertaken by this Association; and that the Association pledges to the same end the utilization and active help of its Sections and Committees dealing with the various branches of the subject.

The Association's Committee reported to the House of Delegates that under the authority voted by the House last October (32 A.B.A.J. 854), "the organizational plans for carrying forward the joint project of the Canadian and American Bar Associations were well under way, under the direction of their respective Presidents and Committees, before the General Assembly acted". The Committee said that "the first task which will be undertaken will be a development, and then a formulation, of the principles and rules which should enter into a Declaration of the Rights and Duties of States. The principles and concepts to be derived from the Charter and the Judgment of the International Military Tribunal will be one of the considered questions; the General Assembly of The United Nations has so directed. A comprehensive and

workable definition of 'aggression', the architect, builder of wars, will be a primary task."

International Law Should Not Be Left to Specialists

The Committee gave to the House the reasons for the procedures it has adopted for the tasks at hand. "The development and formulation of recommendations for such a Declaration," the Committee said, "could not be treated, in the representative organizations of lawyers of Canada and the United States, as a task for a few men or for specialists or academicians only. If our contribution is to have its full worth and weight, it must be fashioned from the enlightened and considered judgment of many lawyers, in all parts of the two countries, ascertained through the methods which the two Associations have hitherto employed and have perfected from their experience."

The Committee next outlined the procedures to be followed.

> In the United States, the role and the principles of international law are being presented at the Regional Meetings of Association members in various parts of the country. These are virtually "local Assemblies" of Association members, leading up to the Assembly of the Annual Meeting. Opportunities for discussion and the offering of Resolutions, to be placed before the House of Delegates if approved, are afforded at each Regional Meeting.
>
> In addition, as is virtually necessary in dealing with such a subject, some twenty-five or more Regional Group Conferences will be convened throughout the United States, and five or six in Canada, for detailed study of specific questions and principles upon specific documents and agenda. This is the method which was used so effectively by the two Associations, in 1944-45, to develop their joint recommendations as to the World Court and the Statute of the Court. The consensus obtained through such a series of conferences has far more significance than could be attached to the work of any one Committee or group. These Regional Group Conferences will start in March and will be spread over the intervening months until mid-summer.
>
> It is expected that arranged-for studies of specific subjects within the scope of the over-all project will go forward contemporaneously in the Section of International and Comparative Law and in various other Sections and Committees of the Association in their special fields. As soon as the results of the Regional Meetings, the Regional Group Conferences, and the above-stated studies, become available, it is planned that the definitive statement and draftsmanship shall be undertaken with the cooperation of the Section of International and Comparative Law, under the supervision of the Reporter in charge of the work. At all stages, your Committee and the Reporter will have the active help and the financial assistance of the Carnegie Endowment for Peace, particularly its Division for International Law, of which the Director is a member of your Committee.

Details of the Organization of the Work

The Committee reported that Reginald Heber Smith is in administrative charge of arranging for the Regional Group Conferences, the cooperation with the Canadian Bar Association, and other phases of the work as to international law. "Judge Manley O. Hudson will be the Reporter, with Louis B. Sohn as Assistant Reporter," the Report said. "They will attend and conduct all Regional Group Conferences in the United States and Canada. Wherever practicable, a member of your Committee will attend each Regional Group Conference.

"Responsibility for determining and reporting to the House the results of the work at appropriate stages will be undertaken by your Committee. Its sub-committee for this purpose is Judge Orie L. Phillips, George A. Finch, and Reginald Heber Smith. Other members of your Committee are assigned to other phases of its work."

Cooperation With Other Organizations May Follow

The Committee reported to the House that "Although the immediate arrangements are for the cooperation of the Canadian and American Bar Associations, the President of our Association is of the opinion, shared by your Committee, that the initial project will at appropriate stages be broadened by working with other National and international organizations of lawyers and legal scholars, whose participation the General Assembly has sought to bring about. The relationships of our Association to other professional and learned organizations, in our country, in the Americas, and in the world, are already such as to facilitate such a cooperation".

In this connection, the Committee said that before the Academy of International and Comparative Law, of which George A. Finch of the Association's Committee is the Director, convened in Havana, Cuba, this month, President Rix of our Association explained to the assembled legal scholars the work which the two great Bar Associations of North America have undertaken, and then declared:

> That the work which we have started will embrace the efforts of lawyers of other countries is evident, for work such as this must of necessity be all-embracing. We hope that during our stay here we may have the opportunity of discussing this work with lawyers in attendance from many countries.
>
> Ways will be found, through our discussions, for active participation by the Academy in the research and discussion by the scholars of your Academy and for their consideration at your meetings of drafts and memoranda as they are completed. It is manifest that a tremendous task such as is now being undertaken will require the effort of many students of international law. Only if the submitted result is the product of many minds will it represent a true cross-section of an advised and educated opinion. Only through such advised opinion can the power of united action be brought to bear in many Nations to secure the adoption of principles of international law by treaties or conventions, for the guidance of the Nations, the World Court, and the Assembly and Security Council of The United Nations.
>
> The Nations of the Western Hemisphere share a fateful destiny for the peace and wellbeing of the world. If we are to live by international law, it must be made a byword and not kept as the property of experts. Popular support for international law must be built up through lawyers and through them by the public generally. Only an advised public opinion will provide the support in all Nations for

the enduring principles of peace through international law. Work such as you are undertaking here is a cornerstone of the structure of peace.

Non-Governmental Organizations Should Take the Lead

The Committee's Report stated realistically the conditions which call for active leadership and participation, on the part of the learned and professional organizations of all lands, in behalf of international law. "None of us would be keen or objective in his observations," said the Committee, "if he did not realize that at the present time there appears to be no active or inspirited interest, in many of the chancellories of the Nations, for proceeding with the progressive development and codification of international law. The General Assembly of The United Nations has implemented the hard-won mandate of the Charter, but the spark of enthusiasm which flamed in the General Assembly seems to have no counterpart in many of the home governments. We should be false to reality if we did not see that the leaders of present governments are engrossed in issues which are acute at the political levels. They are not motivated to refer legal disputes to the World Court, to put law in the place of debate and negotiation, or to take steps to develop international law as an untried means of peace and security."

Lawyers Should Speak Out and Work for the Rule of Law

In closing this phase of its unanimous Report, the Committee urged that the lawyers of North America give to the project their whole-hearted support, in their Bar Associations and their home communities. The Committee said:

> Time and again, during the acrimony of debates and "vetoes" in the Security Council, thoughtful men and women of many lands have longed for strong, clear voices raised in behalf of the role of law and the World Court. With their inability to agree on the bases of peace treaties and even on the means of saving civilization from the atomic bomb, the Nations seem unready and hesitant to confront each other also in the still more difficult and delicate tasks of stating the rules of international law. At present, they turn to professional organizations and legal scholars to carry forward the banner which they do not themselves boldly advance.
>
> Sooner or later, in the opinion of your Committee, the peace-loving Nations will come to realize that the abiding hope for peace and justice is through strengthening and extending the authority of law. Until then, the great objective rests with the General Assembly, its Committee and the staff of the Secretary-General, and with the National and international organizations which have labored long in that field. In the present tense, the Canadian and American Bar Associations have a great opportunity and a bounden duty, to develop the principles of international law and to rally public opinion in support of international law, until crises have passed and governments are impelled to proceed.

Further details of the work and plans will be given in our subsequent issues.

Federal Judicial Nominees: State Bars Asked to Report on Qualifications

■ Supplementing what our Association has been trying to organize and do through its newly created Committee on the Judiciary, Senator Alexander Wiley, of Wisconsin, Chairman of the Senate's Committee on the Judiciary, to which are referred all nominations for federal judicial office, has asked all State Bar organizations throughout the United States to assist his Committee by reporting to him as to the qualifications of persons nominated for such offices by The President of the United States.

Chairman Wiley's letter to the President of each State Bar Association was as follows:

"I am writing to ask a favor of you and your organization. May I ask if you will assume the responsibility of reporting to me as Chairman of the Senate Judiciary Committee in relation to the character, the judicial ability, the temperament, and the political philosophy (irrespective of party) of federal judiciary nominees from your State. Perhaps you have noticed in the newspapers that I have taken the position that all nominations which come to my Committee for federal offices should be thoroughly screened. I know of no better way to accomplish that than to ask the Bar of each State to report on The President's nominees.

"Too often in the past men who were not qualified from either the standpoint of their character, their legal ability or other justified basis have been appointed to high office merely for political reasons; and the result has been to weaken the people's respect of the federal judiciary.

"In other matters affecting the National welfare and impinging on the U. S. Constitution and the basic laws of the land, I will always welcome the official expressions of your State Bar.

"I feel that we lawyers must bear the responsibility which is inherent in our profession, to be constantly on guard and to assist our government to the maximum extent in helping to assure a continuation of our Constitutional system of checks and balances."

9

Francis A. Garrecht:

Senior Circuit Judge: Ninth Circuit

■ A native son of the State of Washington is the subject of our cover portrait and the following sketch, for this "anniversary month" of his appointment to the bench fourteen years ago. His career as a lawyer and jurist have made him a beloved and respected personality of the West Coast.

The extensive and diversified Ninth Circuit is made up of the federal judicial districts within the States of California, Oregon, Nevada, Washington, Idaho, Montana, Arizona, and the Territory of Hawaii. Its area comprises about 777,000 square miles.

The present members of the Court of Appeals for the Ninth Circuit are:

William O. Douglas, Circuit Justice
Francis A. Garrecht, Senior Circuit Judge
William Denman
Clifton Mathews
Albert Lee Stephens
William Healy
Homer T. Bone
William E. Orr
} Circuit Judges

There are thirty-one District Judges under its jurisdiction.

In his seventy-seventh year, Judge Garrecht is in age the eldest of the Senior Circuit Judges now on the bench. He is performing his duties robustly and with unabated acumen. Although he has served in the Court since March of 1933, following his appointment in his sixty-fourth year, he is the junior in length of service as Senior Circuit Judge, having become such on May 11, 1945.

Sketch of Judge Garrecht

■ In June of 1945, Whitman College (in the State of Washington) honored one of its former students. The citation read: "FRANCIS ARTHUR GARRECHT, a native son, eminent churchman, distinguished jurist, and honored public servant, for your conspicuous record in a profession performing one of the highest functions in civilization, for your manifold services to your community, your State, and your Nation, for the inspiration your career has provided for every aspiring public servant, Whitman College confers upon you the degree of Doctor of Civil Law."

The citation is an accurate portrait of the Senior Judge of the Ninth Federal Circuit. Whether his career is described in many words or few, it is all summed up in the phrase: *Pro Deo et Patria.* The motto illumines his many achievements. It portrays him in private life and public—as family man, and as legislator, attorney and judge. The result is a career characterized by the happy blendings of justice and charity, a profound sense of the dignity of law and a deep-seated love of his fellow man. It is the career of a lawyer to whom man-made laws are not irresponsible commands but instrumentalities for the protection of God-given rights, the juridical embodiment of that natural justice which underlies every society of freemen.

Francis Arthur Garrecht is a son of the Far West. He was born in Walla Walla, in the State of Washington, on September 11, 1870. His parents were Daniel and Caroline Garrecht, both of whom had come to this country from their native Germany. Francis was one of three children. His childhood and youth were spent in his native town, under the benign influences of a fine family and of the wholesome unaffectedness of western community life. His education was received in Walla Walla, first at St. Patrick's Academy, next at La Salle Institute, and finally at Whitman College, which counts among its alumni other distinguished members of the federal judiciary, including Mr. Justice William O. Douglas of the Supreme Court and District Judge James Alger Fee of the District of Oregon.

Following his graduation, he studied law under the direction of two of the ablest lawyers in Walla Walla, George T. Thompson and Judge John Sharpstein. These studies were supplemented by practical experience as deputy clerk in the local Superior Court, a position which he occupied from his twentieth to his twenty-fourth year. On his birthday in 1894, after a thorough examination by a board of three attorneys appointed by the Court, he was admitted to the practice of law, by Judge Upton of the Superior Court.

Four years later—on November 23, 1898—he was married to Miss Frances T. Lyons of Walla Walla. The home

which they founded was to be blessed by five children and to be the central interest of his life.

Practice of His Profession in Walla Walla

The first twenty years of his professional life were spent in private law practice in Walla Walla. It was a very successful practice, but important engagements were not permitted to exclude undertakings, cheerfully accepted and successfully prosecuted, on behalf of the poor in both civil and criminal litigation. Especially devoted was he to justice for races which suffer discrimination even in America, and the result was that he soon became known as a ready friend in Court for all such litigants.

Another characteristic which early manifested itself was his restlessness concerning social evils and his insistence upon the necessity of political reform and of legislation for the curbing of economic abuses. Before he had become twenty-one years old, he had begun writing articles against oppressive monopolies and the exploitation of the laboring classes. For the elimination of such evils, he advocated participation in political life by those who were qualified—an admonition which he himself observed, with the result that from 1911 to 1913 he served as representative from his district, and as minority leader, in the lower House of the Washington Legislature.

His Talents Manifested in the State Legislature

The talents which he manifested in the Legislature brought immediate recognition. The press accounts indicated that he soon was the peer of veteran members of that assembly. This was true not only in his grasp of legislative problems, but in another respect in which he had early become an outstanding figure in his State; namely, his power of oratory. His talents in that respect were well described in a press dispatch of that day which reads: "Representative Francis A. Garrecht of Walla Walla County is easily a human torchlight of the popular House, and whenever he rises to his feet something coruscating is certain to be demonstrated to the gallery, craning their necks over the edges of the railing in an eager effort to see the curly-haired orator, whose Ingersollian reference to 'the voiceless silence of the dreamless dust' has become a sort of corridor classic." Another news account of the day stated that "Mr. Garrecht has been in the limelight more or less continually since going to Olympia, and his original bright and witty sayings have been the talk of the whole State."

While in the Legislature he displayed the same solicitude for the victims of race prejudice as he had in his practice in the Courts. This is indicated by a letter from an organization of Negro citizens, to another such organization, regarding a bill which would have been offensive to members of their race. In the letter, the author said: "I have been authorized to write you and others to inform you of the work of your representative, the Hon. F. A. Garrecht of the 13th District, Walla Walla County. When the bill was up in the House for passage, this man without any solicitation from anyone save his conscience jumped into the breach and by his efforts consigned this measure to the scrap heap."

Vigorous Service as United States Attorney

Courage and talent of this kind naturally brought official recognition. It came in 1913, with his appointment as United States Attorney of the Eastern District of Washington. And thus, after 43 years in his native Walla Walla, he and his family left that city for their new residence in Spokane.

For eight years Francis A. Garrecht served as United States Attorney. They were years in which he labored prodigiously by taking personal charge of one important cause after another and pressing it through to final judgment, with the warm commendation of his superiors in Washington. Among these cases were *United States* v. *West Side Irrigation District*, 230 Fed. 284, affirmed 246 Fed. 212, the outcome of which resulted in the Government's spending $8,000,000 in the Yakima Irrigation project; *Northern Pacific Railway Co.* v. *Wismer*, 230 Fed. 591, affirmed 246 U. S. 283, in which the government successfully resisted the claims of the Northern Pacific Railway Company to 64,000 acres in the Spokane Indian Reservation; and some noted litigation which involved the rights of Indians under treaty to take fish from streams in the State of Washington.

His conduct of the fishing cases resulted in an honor which has rarely been conferred by an Indian tribe upon a white man. In a ceremony colored by all the pomp of tribal ritual, the Yakima Indian nation elected him a tribal chief and gave him the name Chief Khe-ach-nee, which means "light of the morning," because, as they said, like the dawn he had made them happy and had brought their treaty out from hiding and made it shine.

In addition to civil litigation, he conducted a large number of criminal prosecutions. His impartiality and courage were indicated by the fact that some of these cases consisted of prosecutions of prominent and influential persons for fraud. As a prosecutor he was very successful; but while he labored hard to bring men to justice, he was once heard to say that he was sorry for every man he convicted but one. He even responded to a condemned man's request for a reconciliation by spending an hour with him on the night before the execution.

Private Practice and Public Service

After eight years as United States Attorney, he returned to private practice, this time in Spokane, in partnership with E. P. Twohy. Mr. Garrecht helped to bring about the passage of the Co-operative Marketing Law of the State of Washington, and prepared the articles of incorporation for the Wheat Growers' Associations of Washington, Oregon, Idaho and Montana. Besides being

the attorney for these Associations, he was counsel for the Inland Empire Dairy Producers' Association. All these organizations are still functioning.

But as in his earlier years, he did not permit the demands of practice to absorb all his interest. He continued to take an active part in the political life of his State and of the Nation. He was a State Democratic Committeeman, from Spokane County; he acted as attorney for the State Banking Department in Spokane liquidations; and he was legal adviser to Governor Clarence D. Martin during a legislative session. And in the National scene, he was a delegate to the Democratic National Convention of 1932.

He had early taken interest in the work of the organized Bar. He became a member of the American Bar Association in 1908. So today he ranks as one of our Senior Members.

Appointment to the Circuit Court of Appeals

His appointment to the Circuit Court of Appeals came on March 4, 1933, when he was named by President Roosevelt to succeed the late Judge Frank H. Rudkin. His appointment was made on the day President Roosevelt took office. At the time Judge Garrecht ascended the bench, the Court for the Ninth Circuit consisted of three members, the other two being the now retired Judge Curtis D. Wilbur (formerly Secretary of the Navy and also formerly Chief Justice of the California Supreme Court) and the late Judge William H. Sawtelle. He became the Senior Circuit Judge in his Circuit on May 11, 1945.

In the fourteen years that he has been on the Court, Judge Garrecht has written approximately 500 opinions, including dissents. His opinions reflect a truly judicial temperament. They are calm but forceful. They are extremely thorough, even meticulous, in dealing explicitly with every relevant point and making abundantly clear all the reasoning which has led to his conclusion. In dealing with evidence or authorities, he does not rely upon compact summaries or bare citations but quotes the pertinent portions of the record or decisions, so that the opinion leaves nothing else to be referred to. From the standpoint of the reader, he observes another important canon: He has a style which is clear and is enlivened by happy phrases. In addition he tells a story and preserves interest.

From his speeches and writings and his activities in the Democratic party, it is evident that he is in general sympathy with the social legislation which has characterized the past thirteen years. Indeed, such legislation was but the embodiment of his own social philosophy, a philosophy which he had advocated from his youth. Yet having been placed upon the bench, his attitude toward cases arising under such legislation has been judicial in the strictest sense. He has upheld decisions of administrative bodies where he has found them just and proper, but he has with equal readiness stricken them down where he has found them partisan or unfair to employer or corporation or executive. Such detachment sheds credit upon our federal judiciary, and it is a worthy tribute to Judge Garrecht that he has set such a splendid example.

Another quality which stands forth in his opinions is his expertness in analyzing and marshalling the evidence, a quality which is doubtless due in large measure to his breadth of experience at the Bar. Over and over again, a decision of his has depended upon this ability to go to the core of a complex and confusing record and lay bare the decisive fact upon which the whole case turns.

Comment on Some of His Notable Decisions

As might be expected, he has participated in some notable cases. Reference to a few of them may illustrate, at least in part, the character of his convictions and the part he has played in the work of this high tribunal.

A noted labor-law case in which he participated was *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 87 F. (2d) 611 and 92 F. (2d) 761 (on rehearing), which involved an order of the Labor Relations Board requiring the reinstatement of striking employees, with pay during the period of the strike. The majority of the Court denied the Board's petition for an enforcement order, one of the judges in the first hearing holding that the National Labor Relations Act was unconstitutional. To this Judge Garrecht wrote a vigorous dissenting opinion, saying: "The main opinion argues for absolute liberty to contract, but the irony of the situation is that under existing economic conditions such freedom as between master and worker is mostly mythical. The only liberty interfered with is the liberty of the strong to oppress the weak." Judge Garrecht's dissent was upheld by the Supreme Court, which reversed the Circuit Court's decision. (304 U. S. 333.)

But, as indicated above, Judge Garrecht could be equally critical of any partisanship by the Labor Board. A case in point is *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, in which he wrote the opinion which overturned an order of the Board by which the Board had found that certain employees had been discharged because of union activities. Regarding the findings of the Board, Judge Garrecht in his opinion said: ". . . the ordinary judicial approach to the consideration of evidence is abandoned and a novel method invoked by which statements made by dissatisfied employees upon their examination in chief are quoted to support some of the findings of the Board, although, in specific instances, this evidence was modified or eliminated by admissions made on cross-examination. On the other hand, testimony of Company officials which disputed the charges, even where apparently corroborated, was invariably disregarded wherever there was a conflict in the evidence."

Another case of importance and prominence was *Pacific Gas & Electric Company* v. *Securities and Exchange Commission*, 127 F. (2d) 378. The question was whether Pacific Gas & Electric Company was a subsidiary of North American Company, which held 17.71 per cent of its stock. The statute provided that a subsidiary was a company 10 per cent of whose stock was held or controlled by another company, called a holding company; but it gave authority to the Commission nevertheless to declare it not to be a subsidiary under certain conditions, chiefly consisting of lack of control. The Commission declined so to declare in the case of the Pacific Gas & Electric Company; and the Circuit Court upheld its decision, with Judge Garrecht dissenting. Judge Garrecht was very critical of the Commission's findings, saying that "To reach the conclusion arrived at by the Commission every circumstance is viewed with a hostile eye and every instance tortured into some semblance of sinister purpose," and that "there are . . . instances where the Commission very frankly has interpreted the testimony of the witnesses contrary to their evidence."[1]

Another noted case in which he participated was that of *Gillons* v. *Shell Oil Co. of California*, 86 F. (2d) 600, a suit for alleged patent infringement. Judge Garrecht wrote the opinion of the Court which held that the action was barred by laches. The opinion is one referred to by patent attorneys as a leading case on laches in respect of a claim of infringement. In his opinion, Judge Garrecht made a characteristic reply to a point raised in appellants' brief. In their brief, appellants stated: "We have never found any decision or opinion by any Court holding that a plaintiff without knowledge or proof but possessed merely of a *hope* or suspicion that he has a cause of action must file his cause or be guilty of laches merely because he may acquire the right of discovery after filing suit." (Italics the Court's.) To this argument Judge Garrecht replied: "Applying, as we must, the foregoing observation to the instant case, we find the somewhat surprising suggestion that patent holders might 'hope' that their patent was being infringed!"

His Solicitude for Fairness in the Judicial Process

While he had been a zealous prosecutor, especially of fraud, Judge Garrecht has always been very solicitous of fairness in judicial process. Accordingly, in *Williams* v. *United States*, 93 F. (2d) 685, he reversed a conviction in a mail fraud case, on the ground of interference by the trial Court in the examination of witnesses. He held that by his conduct "the learned trial Court passed beyond the immemorial limits set down for Anglo-American tribunals" and that the prejudice was not removed by the fact that the conduct was unintentional.

He wrote the opinions in the conspiracy case of *Craig* v. *United States*, 81 F. (2d) 816 and the securities fraud case of *Coplin* v. *United States*, 88 F. (2d) 652, both of them being good examples of his meticulous handling of evidentiary issues. His reply to a point raised in the *Craig* case is characteristic. Appellant contended that the indictment should have alleged the conspiracy in more specific terms. In reply to this, Judge Garrecht wrote: "The details of a conspiracy are worked out and unfolded during its course. It would be holding a pleader to an inordinate degree of exactitude to compel him to allege each step with mathematical accuracy; for, when a plan is hatched, the conspirators themselves do not foresee all its ramifications. In the words of Iago—

> 'Tis here, but yet confused:
> Knavery's plain face is never seen
> till used."

His Decision as to Indian Rights at Palm Springs

The most recent opinion by Judge Garrecht which has attracted widespread attention is in the case of *United States* v. *Lee Arenas*, handed down last December 12. On the day the decision was rendered, headlines in the San Francisco press read: "Palm Springs Awarded to Indians by U. S. Court." What the Court actually held was that Arenas, an Indian of Palm Springs, California, was entitled to an "allotment trust patent" to ninety-four acres of land in and around that fashionable resort. The decision was a culmination of an eight-years' legal battle involving Arenas and some of his fellow tribesmen who, over the objection of many of the white residents of the resort, had been striving to obtain individual grants to terrain now held in communal ownership by the entire Palm Springs band.

Referring to the arguments of "prominent white residents" of Palm Springs urging the sale of the Indians' lands, Judge Garrecht said: "The arguments . . . had no connection, for the most part, with the welfare of the Indians, but, unmistakably savored of the counting house." And regarding delay by the Government in acting on the tribesmen's claims, his opinion stated: "The Great White Father should place his dealings with his underprivileged wards upon a higher plane than that which has marked the conduct of the department in the instant case."

On the bench, Judge Garrecht is attentive, patient and composed. He does not interrupt much. He believes that counsel can be most helpful to the Court if permitted to present his argument in his own way. When counsel is through, he sometimes asks a question or two, but he does not cross-examine. He believes that if an attorney is prepared there is seldom need to ask him questions; and if not, little help can be expected from him, especially on the spur of the moment. Judge Garrecht is kindly; he does not censure or strive for victory over counsel. He is especially patient with well meaning but inexperienced attorneys.

1. On rehearing, this case was again decided in favor of the Commission, this time because of an equally divided Court, Judge Garrecht repeating his dissent. The ultimate result was affirmance by the Supreme Court because of an equal division in that Court.

While he has the firmness requisite for a chief judge, he presides over the Court with unfailing courtesy and kindness to his colleagues on the bench and to the clerks and staff.

By personality and by wisdom, as well as by seniority in service, he is the leader of his Court, a kindly but potent influence for unity and for thoroughness in the study. He is the "captain of the team", and his teamwork is without assertion of self.

Members of the Bar of the Ninth Circuit, and others who have occasion to appear before that Court, recall most pleasantly another member of its "team", in addition to its judges. Paul P. O'Brien, the beloved Clerk of the Court, is a noted figure in its work and in the relationship of the profession to it. He has held his present post for many years, and is the author of the *Manual of Federal Appellate Procedure*, which is widely regarded as a useful work on the subject. A few years ago, the San Francisco Bar Association gave a dinner to Mr. O'Brien, at which leading members of the bench and Bar paid him sincere and glowing tributes. The Court and its Senior Circuit Judge have regarded themselves as fortunate in having such an adjutant in the administrative work of the Court and the Clerk's office.

Citations for Academic Honors

In addition to the Whitman College degree, Judge Garrecht has received other academic honors. Among these were the DeSmet medal from Gonzaga University in Spokane, for outstanding service to Church and State, and the degree of Doctor of Laws from the University of San Francisco.

The citation issued in connection with the latter degree stated: "David the Psalmist in vision heard God say to the judges of Israel: 'Ye are gods, ye are the sons of the Most High'; and he set thus for all time the measure of our appreciation of the just and upright judge. . . . To follow knowledge like a rising star that guides him into the presence of the eternal Law-giver, to bring his findings to the scrutiny of the divine justice and find himself approved, to be like unto God in tempering justice with mercy—only such a man wears his judicial robes with honor. And because the University of San Francisco has found a man with these ideals nobly exemplified in Francis Arthur Garrecht . . . it rejoices to honor him."

Religion a Deep Part of His Life

It is a significant fact that the honors conferred upon him all make reference to the part religion has played in his life. For he is a man of deep religious faith and principle. And what is more, his religion is not mere doctrine, but a living thing. As one close to him has described him: "He is a *practicing* Christian". He is a Catholic who has served his Church in many ways, not the least of which has been the realization in his own life of the Christian precepts.

His philosophy in this respect is indicated in a press interview on a visit to his old home in Spokane in 1942, wherein he said: "The darkest feature of the world is the fact that we bring on our own troubles in trying to get rid of God. Our Government is unique in that it was founded on the recognition of God. That is why, today, countless millions are looking to us."

Judge Garrecht's Philosophy of Law

His philosophy of law is in harmony with these convictions. Law, to him, is not mere fact. It is not simply a man-made regulation backed by force. It has a relation to morals. It involves "ought" as well as "is". It deals with men, who are spiritual beings; and therefore it must respect the dignity of human personality. In his speeches and writings there is frequent reference to those fundamental principles which are essential to the security of personal rights. The Preamble to the Declaration of Independence is for him perennially true. And he cites with confidence those passages of Washington's Farewell Address in which our first President made it clear that without adherence to the basic principles of religion and morality, no Nation can endure.

His work keeps him chiefly in San Francisco where, since the death of his devoted wife two years ago, he is consoled by the companionship of his two lovely daughters. He makes frequent trips to Spokane, which is still his home. On such trips, he is the recipient of many calls from former clients, and often included among these are the humble Indian, Negro and Chinese, for whom he stood in their hour of need.

While he is past threescore and ten, like many another able judge he still exercises his faculties with undiminished alertness and vigor. What he has done he has done well. But the past possesses no lodestar. While the day lasts, then a man works. The night is still far off, and only when the night comes a man may rest.

10

"Portal-To-Portal" Pay:

Can Employers Recoup Retroactive Payments?

by Benjamin H. Long • of the Michigan Bar

■ Probably no questions of commingled law and public policy have come to the fore so rapidly and aroused so general public interest and controversy, as have those involved in the "portal-to-portal" pay suits based on the decision of the Supreme Court in the *Mt. Clemens Pottery Company case*. This has afforded another instance of the fact, characteristic under the American system, that legal questions affecting the rights of great numbers of people and having vast effects on the Nation's economy, are often determined in lawsuits between private litigants, with no representation or presentation of the large public interests fundamentally involved.

At the time this was written, the *Mt. Clemens* case had been heard further for fact-finding, by the District Judge who heard it in first instance. The Department of Justice asked him to dismiss the workers' claims outright, and, upon its application authorized by the President of the United States, has been allowed to intervene as a party, for the avowed purpose of carrying the case again before the Supreme Court. The decision of Judge Picard, analyzed in "Courts, Departments and Agencies" in this issue, seems not to have settled the law, or the facts, as to "portal-to-portal" suits generally. Legislation to limit or bar "portal-to-portal" suits or to declare more explicitly the intent of the Congress as to the "workweek" and "overtime", is in course of hearing before Committees of the Congress, with questions raised as to its validity. Meanwhile, other suits that have been brought, for amounts estimated to total more than five billion dollars, have been held in abeyance. Small employers as well as large, in practically all parts of the United States, have been confronted with such suits. The Court's ruling that suits under the Wage and Hour Act for uncompensated overtime cannot be settled or compromised, has added to the complexities.

With every desire to give to our readers material which will be helpful to them on legal questions of such importance, the Board of Editors has not found it practicable, as to either the decisional law or the bases for present legislation. The developments are so rapid and seem so uncertain that such an article might become virtually obsolete, between the time of its preparation and its delivery to our readers. Moreover, the developments and the views of opposing counsel have been extensively reported in the daily press and followed closely by interested lawyers.

The subject of the recoupment, from the Government or other sources, of such "portal-to-portal" claims as may finally be allowed and sustained, has not had like exposition in the newspapers. Perhaps because of its complexity it has not been adapted to comprehensive and dependable presentation in the press. The following article deals with considerations which many lawyers need currently to take into account. A substantial change in the legal situation affecting its components is believed to be unlikely, before this article comes to our readers.

Benjamin H. Long was born in 1906 in Logansport, Indiana, where his father was a lawyer until his death in 1940. After being graduated from Indiana University (1926) and Harvard Law School (1929), he came to Detroit, and became associated with the firm of Dykema, Jones and Wheat, of which he has been a member since 1938. He has been a member of our Association since 1934, and is a member of the State Bar of Michigan, the Detroit Bar Association, the American Judicature Society and the Judge Advocates' Association.

As qualifications for his present article, he has had a varied experience in the legal aspects of war procurement. As an officer in the Army of the United States during World War II, he served successively as a field Litigation Officer, as Assistant to the General Counsel of the War Contracts Price Adjustment Board, and as a Member of the War Department Board of Contract Appeals, in the office of the Under Secretary of War.

BENJAMIN H. LONG

■ The "portal-to-portal" claims inspired by the *Mt. Clemens Pottery Company* case are claims for additional wages for work alleged to have been performed but not paid for during past years. Wages are basic costs of production. If the claims had been established at the time the services were performed, they would (a) have been taken into account in determining the employer's contract prices under fixed-price contracts for goods and services; (b) have been repaid to the employer as reimbursable items under cost-plus-a-fixed-fee contracts; (c) have been deducted as allowable items of cost in renegotiation settlements, where they related to war business; and (d) have been allowed as deductions from gross income in determining federal income and excess-profits taxes. In large part the claims cover the war period and relate to war production. If established then, the burden would have been carried—with the other financial burdens of the immense war effort—by the federal Government and ultimately by the taxpayers.

Whether, and to what extent, the burden will now be so carried is a legal question of first importance to all companies facing these claims. It may be said at the outset that no broad answer, of universal application, can be given. Mr. Justice Holmes' *dictum* that "general propositions do not decide concrete cases"[1] is nowhere more applicable than here. But a short outline of the legal issues, with an indication of the basic principles involved and the chief areas of legal uncertainty, may be of assistance to attorneys in considering the problems faced by individual concerns.

Statutory Nature of "Portal Pay" Claims

The legal nature of the claims should first be stated. They are principally for unpaid overtime compensation, together with liquidated damages, under the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. Sec. 201, *et seq*). This statute provides that "No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours . . . specified at a rate of not less than one and one-half times the regular rate at which he is employed." (Section 7). The forty-hour requirement was forty-four hours until October of 1939, and forty-two hours until October of 1940. The Act further provides that "any employer who violates the provisions of Section . . . 7 . . . shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." (Section 16). The statute does not define "workweek."

In *Anderson* v. *Mt. Clemens Pottery Company*, 90 L. ed. 1114, 66 Sup. Ct. 1187 (June 10, 1946), Mr. Justice Murphy, speaking for the Court, said that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." There was evidence that this employer required its employees to punch in, walk to their work benches, and perform preliminary duties, such as putting on work clothing, greasing and taping arms, preparing equipment for productive work, assembling and sharpening tools, turning on switches, and opening windows. The time spent in these activities must, the Court said, "be accorded appropriate compensation." It was further stated (quoting an earlier "portal-to-portal" case) that "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" must be included in the statutory workweek and compensated accordingly, "regardless of contrary custom or contract." Justices Burton and Frankfurter dissented, and Justice Jackson (absent at Nuremberg) did not participate in the decision. It is the variation of the above doctrine from custom and contract which is the source of the current controversies.

For our purpose in this article, it should be kept in mind that in a legal sense these claims rest on the same basis as other claims for unpaid overtime compensation under the Fair Labor Standards Act; such as claims by employees wrongfully classified as administrative or executive employees. Earlier payments of this nature may provide legal precedents for recoupment of "portal-to-portal" payments from the government or other sources.

Remote Prospect of Recoupment Under "Fixed-Price" Contracts

The possibility of recovery of "portal-to-portal" payments from the Government or other customers for whom "fixed-price" contracts have been performed is remote. Under "fixed-price" contracts, labor costs are the responsibility of the contractor; while estimated labor costs are undoubtedly taken into account in the negotiations leading to determination of the price, such negotiations are merged in the contract. Variations between anticipated and actual labor costs have been the subject of a number of claims before the Courts and before War and Navy Department Boards of Contract Ap-

1. Lochner v. New York, 198 U.S. 45, 76 (1905).

peals. They have almost universally been denied. Only in cases where there appears some ground for application of the equitable doctrine of reformation of contracts for mutual mistake as to material facts, does any ground for relief appear. It is unlikely that this doctrine would give relief in "portal-to-portal" cases.

During the war, applications for increases in contract prices by reason of unanticipated increases in labor costs were frequently presented under the First War Powers Act, 1941, (55 Stat. 838; 50 U.S.C. App. Section 601, *et seq.*) and Presidential Executive Order No. 9001, which authorized modifications of contracts, without regard to other provisions of law, where such action "would facilitate the prosecution of the war." But after V-J Day the Executive departments took the position that such action could no longer be deemed to facilitate the prosecution of the war, under any circumstances. While the power still exists, it is not believed to present a substantial possibility of recovery at the present time.

Questions Under the War Contractors' Relief Act

In August of 1946, the Congress passed the War Contractors' Relief Act (Public Law No. 657, 79th Congress, Second Session; approved August 7, 1946.) This statute empowers the Executive departments and agencies to pay claims of contractors and subcontractors for losses incurred between September 16, 1940, and August 14, 1945, in the performance of war contracts and sub-contracts. The statute may be construed to provide relief in situations where, after payment of "portal-to-portal" claims, the operations of the employer over the specified 1940-1945 period resulted in a loss.

A serious obstacle is, however, presented by the requirement of the statute that claims shall be limited "to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945", and by the further requirement that claims under the statute must have been filed within six months after the approval of the Act; that is, before February 7, 1947. The requirement that requests for relief must have been filed before August 14, 1945, is believed to be a very inequitable feature of the law, and there is some chance that it will be amended to remove this requirement, in which case the time for filing claims would probably be extended. It is possible, therefore, that in a few situations this statute may be availed of for the recoupment of losses resulting from "portal-to-portal" claims.

Recovery Under Contract Termination Settlements

Mention should also be made of the possibility of recovery of labor costs under contract termination settlements. Some "portal-to-portal" wage claims may relate to services attributable to the terminated portion of war contracts, and as such they would be includable in termination settlements, under the termination provisions of government contracts or sub-contracts and under the Contract Settlement Act of 1944. The latter Act contains no limitation on the period within which such claims may be brought, except in cases where settlement findings or determinations have been made by Government agencies. Completed termination settlements may result in the barring of additional claims under the contracts; they are made "final and conclusive" by statute, though they may be reopened by mutual agreement.[2] The answer in any individual situation can be determined only after a study of the settlement documents.

Recoupment Under "Cost-Plus-A-Fixed-Fee" Contracts

Recoupment from the Government, or from prime contractors or higher-tier sub-contractors, under "cost-plus-a-fixed-fee" contracts, presents probably the best chance for recovery of "portal-to-portal" payments. This possibility was one of the bases of the Government's motion for leave to file a brief as *amicus curiae* in the further proceedings before Federal District Judge Frank A. Picard in the *Mt. Clemens Pottery* case.

Most Government "cost-plus-a-fixed-fee" contracts and many "cost-plus-a-fixed-fee" sub-contracts incorporate the provisions of Treasury Decision 5000, dated July 29, 1940, which was approved by the Secretaries of War and of the Navy on August 2 and August 6, 1940, respectively. Labor costs are clearly reimbursable under T. D. 5000 where they are incurred in performing the contract or are "incident to and necessary for" its performance. Where the services for which the "portal-to-portal claims" are made can be related to the performance of any specific "cost-plus-a-fixed-fee" contract or sub-contract, the amounts paid should be recoverable, from the Government or from the prime contractor or higher-tier sub-contractor. Even if considerable time has elapsed since the completion of the contract, it is unlikely that any applicable statute of limitations will have run, although this point should always be checked. The period of the statute of limitations on contract claims against the Government is six years and commences to run at the time "the cause of action accrues."[3]

In many situations it is possible that further claims under "cost-plus-a-fixed-fee" contracts have been barred by settlement agreements entered into at the time of final settlement of those contracts. Final settlement arrangements should be studied in each individual instance to determine whether this is the case. It should be noted also that in a few cases waivers of "cost-plus-a-fixed-fee" claims were exacted by the Government in connection with renegotiation settlements.

The comments made above as to the possibility of including "portal-to-portal" payments in termination

2. Contract Settlement Act of 1944 (58 Stat. 649, 41 U.S.C. Section 101 et seq.), Sections 6 and 13.

3. 36 Stat. 1139, as amended, 28 U.S.C. Section 262.

settlements of fixed-price contracts apply also to "cost-plus-a-fixed-fee" contracts.

Renegotiation under the federal renegotiation statutes (Renegotiation Acts of 1942 and 1943)[4] covered the years 1942 to 1945, inclusive. A large portion of the "portal-to-portal" claims will involve services rendered during this period and will relate to renegotiable war business. In each case in which the employer made a renegotiation refund of "excessive profits" under the Renegotiation Act, it may be assumed that the refund would have been reduced if the additional wage payments had been paid or established at the time of service, and that the reduction would have been approximately the amount of the "portal-to-portal" claims applicable to war production, subject of course to the standard tax credit adjustments.

However, most employers will now find that their executed renegotiation agreements bar any adjustments for "portal-to-portal" payments for the renegotiation years. Practically all renegotiation payments were made pursuant to voluntary agreements, and a great majority of the cases have been closed. Renegotiation agreements are accorded an exceptional degree of finality by the renegotiation statutes, which provide:

> Any such agreement shall be [final and] conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.[5]

This provision is paraphrased in the standard form of renegotiation agreement, and thus stands as a contractual commitment as well as a statutory prohibition.[6]

Renegotiation settlements were occasionally reopened under First War Powers Act authority during the war; but, as stated above, this power is considered to be no longer available.

Where there have been no agreements, and unilateral government determinations of excessive profits have been made which have not been appealed to the Tax Court or have been decided by the Tax Court on appeal, further claims by the employer are probably barred by statute.[7]

In cases where renegotiation agreements have not been executed, or where unilateral determinations (resulting from failure to agree) are on appeal to the Tax Court, relief may be afforded under the recent ruling of the Treasury Department (January 22, 1947) discussed later in this article in dealing with tax refunds. Under the Renegotiation Act of 1943 and present renegotiation regulations, items of cost are attributed to the renegotiation year in which they are allowable in the determination of taxable income under the Internal Revenue Code.[8] Under this Treasury ruling, "portal-to-portal" payments "necessitated by the decision in *Anderson* v. *Mt. Clemens Pottery Co.*" are to be allocated to the years in which the services were rendered, rather than years in which they are established and paid. Allowance as a renegotiation cost in open renegotiations would thus seem assured where the ruling applies.

If the Treasury ruling should be changed, or overruled by the Courts, and if the individual situation was one in which tax deductions would not be permitted for a renegotiation year, there would still be some chance that the deduction would be permitted in renegotiation. The renegotiation statute requires the allowance of cost items which are allowed as deductions for federal income tax purposes, but there is no converse requirement that *only* such deductions shall be allowed. Present renegotiation regulations recognize possible exceptions to the general rule that renegotiation cost allowances will follow income tax deductions. Such exceptions, which must have the written approval of the Chairman of the War Contracts Price Adjustment Board, might possibly be applied to retroactive "portal-to-portal" payments.[9]

Deductibility for Federal Income and Excess-Profits Tax Purposes—Recovery of Taxes Paid

"Portal-to-portal" wage payments are clearly deductible business expenses for federal income and excess-profits tax purposes. However, in view of the reduction in corporate income tax rates for 1946 and later years, the repeal of the excess-profits tax law for 1946 and later years, and the inapplicability of the excess-profits tax carry-back provisions to taxable years beginning after December 31, 1946, most corporations will find a present deduction of much less value than a deduction for the year in which the service was rendered.

In considering the possibility of deduction for prior years, it should first be noted that claims for refund of income and excess-profits taxes must be filed within three years after the return for the taxable year is filed.[10] For corporations on a calendar year basis, claims for 1943 must thus have been filed before March 15, 1947, and claims for 1944 before March 15, 1948, at the latest. In special situations, as where deficiencies have been asserted or final determination otherwise held open for earlier years, deductions for earlier years may still be permissible.

The Treasury's Ruling of January 22, 1947

On January 22, 1947, the Treasury Department issued a ruling[11] purporting to settle all existing ques-

4. 56 Stat. 245, as amended, 50 U.S.C. App. Section 1191.

5. Renegotiation Acts of 1942 and 1943, Section 403 (c) (4).

6. Renegotiation Regulations, Section 741.1.

7. Renegotiation Act of 1943, Section 403 (c) (1), 403 (e).

8. Renegotiation Act of 1943, Section 403 (a) (4) (b); Renegotiation Regulations, Section 381.4.

9. Renegotiation Regulations, Section 381.6.

10. Internal Revenue Code, Section 322.

11. C.C.H. Standard Federal Tax Service (1947), Par. 33,141.

tions with respect to the proper year for deduction of these "portal-to-portal" payments, for income and excess-profits tax purposes. This ruling stated:

> After careful consideration, in view of the circumstances herein outlined, it is held, under the authority conferred in the last clause of the excerpt from section 43 hereinabove quoted, that taxpayers may be permitted to allocate the amounts of overtime pay and liquidated damages for prior taxable years necessitated by the decision in *Anderson* v. *Mt. Clemens Pottery Co., supra.*, to the year or years in which the services to which such payments relate were rendered. For the purposes of this ruling, all suits which have been filed against employers and all answers or other pleadings thereto filed by employers may be regarded as directed to the ascertainment of the proper amount of overtime work to be compensated for rather than as a denial or contest of the fact of liability or the fundamental basis of computation.

Section 43 of the Internal Revenue Code, quoted in the ruling, reads as follows:

> The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter [Chapter 1, Income Tax] shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

Questions Which Remain as to the Ruling

In spite of the broad and positive character of the ruling doubts must be expressed as to its validity and permanence. It should be noted: (a) That the situation presented to the Treasury Department for ruling had special features which will not be found in most of the current "portal-to-portal" cases, and the ruling goes far beyond the situation presented; (b) That the ruling purports to exercise administrative authority under Section 43 which was denied to the Treasury by *Security Flour Mills Co.* v. *Commissioner,* 321 U.S. 281 (1944); (c) That the statement that all suits and pleadings "may be regarded" as directed to the ascertainment of the proper amount of the claim rather than as a denial or contest of liability would seem to be contrary to fact in many instances; (d) That the ruling applies only to payments "necessitated by the decision" in the *Mt. Clemens* case, although many such payments will have a legal basis indistinguishable, for federal income tax purposes, from the basis of other retroactive overtime payments under the Fair Labor Standards Act; and (e) That the ruling, read literally, applies only to suits filed before January 22, 1947, although no ground for distinction is seen between these and later suits.

Prior to the ruling, the Treasury Department and the Courts had outlined a general distinction between liabilities which had been denied or contested and liabilities which were simply undetermined in amount, and had made this distinction the test of deductibility.[12] The new Treasury ruling places all existing cases on the "undetermined amount" side of the line. No supporting reasoning is advanced; it may have been felt that as the general basis for liability had been established by decision of the Nation's highest Court, it was beyond contest. But in many cases an actual examination of the employer's position with respect to the claims, in the light of the Court decisions cited, will probably lead counsel to exercise great caution in relying on this latest ruling.

In the event of a reversal of the Treasury ruling, and in the few situations to which it will not by its terms apply, determination of the proper year for deduction will require individual study of the facts involved, in the light of the authorities above cited.

Probable Treatment of Recoveries for Liquidated Damages

The foregoing analysis deals with the claims as claims for compensation for services as employees. The statute provides not only for the payment of overtime, but for "an additional equal amount as liquidated damages." It has several times been held by the Courts that these damage payments are more similar to contract claims than to penal awards.[13] It thus seems likely that they will be accorded the same treatment as the basic overtime claim for purposes of reimbursability under "cost-plus-a-fixed-fee" contracts, and will be deductible for renegotiation and tax purposes (they are specifically included in the Treasury ruling of January 22, 1947), although special considerations will be involved in each situation. It is, however, safe to say that the damage payments will receive no more favorable treatment, from the employer's point of view, than the overtime payments.

Conclusions from the Above Analysis

From the foregoing review, it is apparent that the lapse of time between the year of service and the year in which these claims may be finally determined by the Courts, or compromised, has very substantially impaired the employer's right to recoupment from the Government or other sources. No reason "in equity or good conscience" is seen why this should be so, in view of the lack of recognition of the existence of the claims by both labor and management at the time the services were performed, and the indefinite wording of the statutory requirement. If adequate relief from the burden of the claims is not granted, legislative consideration should be given to restoring the employer to the position he would have occupied if the liability had been clear from the start, or to providing some current compensating benefit.

---

12. *I.T. 3563, 1942-2 CB 115;* I.T. 3716, 1945 CB 140; *I.T. 3746, 1945 CB 141;* Dixie Pine Products Co. v. Commissioner, 320 U.S. 516 (1944); Security Flour Mills Co. v. Commissioner, 321 U. S. 281 (1944); *Atlantic Coast Line R.R. Co. v. Commissioner, 4 T.C. 140 (1944);* Baltimore Transfer Co. v. Commissioner, 8 T.C. No. 1 (Jan. 3, 1947); see annotations at 78 L. ed. 734 and 88 L. ed. 273 for other cases. The italicised citations involve retroactive wage payments under the Fair Labor Standards Act.

13. *Overnight Motor Transportation Co., Inc. v. Missel,* 316 U.S. 572 (1942); *Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).*

11

Jurisdiction of World Court:

Association Urges New American Declaration

■ In agreement with the action decisively voted by the Assembly in Atlantic City (32 A.B.A.J. 874; 33 A.B.A.J. 175), the House of Delegates on February 25 put the Association strongly on record in favor of withdrawing, from the American Declaration deposited on August 26, the reservation or condition attached by the Senate's adoption of the Connally Amendment of the Morse Resolution (S. Res. 196) as to American acceptance of the "optional" jurisdiction of the International Court of Justice.

This action was voted by the House of Delegates on the unanimous recommendation of the Association's Committee on Peace and Law Through United Nations, which submitted the results of its comprehensive study of the subject. Thereby the Association aligned itself steadfastly in support of its historic position as to the jurisdiction of the World Court and American leadership in behalf of the Court. Excerpts from the Committee's statement of reasons for its recommendation will be published in our April issue; the Resolutions give them in summary.

■ The House of Delegates at its Chicago meeting adopted on February 25 the following Resolutions as to the Declaration of American acceptance of the jurisdiction of the World Court:

RESOLVED, That the American Bar Association expresses its great satisfaction that the United States, pursuant to the authorization of its Senate, deposited with the Secretary-General of The United Nations, on August 26, 1946, a Declaration under Article 36(2) of the Statute of the International Court of Justice, accepting the jurisdiction of the Court as binding upon it to the extent stated in that Declaration;

RESOLVED FURTHER, That although the Association welcomes this Declaration as a long step forward in American support of the Court and submission to its jurisdiction in international legal disputes, the Association is of the opinion that the prestige and authority of the Court and the leadership of the United States in behalf of the peaceful settlement of international disputes require that a further step be taken, through withdrawal of the reservation put in the Declaration by virtue of the Connally Amendment of the Morse Resolution (S. 196), whereby either the United States or an adverse party, rather than the Court, would determine whether a particular dispute between them is excluded from the Court's jurisdiction because of its connection with matters "essentially within the domestic jurisdiction" of the party so deciding;

RESOLVED FURTHER, That the Association is of the opinion that the retention of such a condition in the American Declaration, as well as any future reliance on it, would be incompatible with the announced purpose of the United States to join in giving to the Court a broad jurisdiction; and, if followed by other Nations in filing or renewing their Declarations, would mean that the United States had created the precedent for a serious backward step through narrowing and impairing the jurisdiction which many countries have vested in the Court;

RESOLVED FURTHER, That the Association, for the fulfillment of the objectives which it has strongly urged for many years in behalf of international law and adjudication, now recommends to the Senate and Government of the United States that they reconsider the subject-matter of the Declaration deposited on August 26, 1946, and that the Senate authorize the filing of a further Declaration which shall not contain the reservation or condition to which the foregoing Resolutions relate.

It was indicated that the Association will present its views to the Senate and the Committee on Foreign Relations at the earliest opportunity.

AMERICAN BAR ASSOCIATION
Journal

EDGAR B. TOLMAN, *Editor-in-Chief Emeritus*.....Chicago, Ill.
WILLIAM L. RANSOM, *Editor-in-Chief*.....New York, N. Y.
LOUISE CHILD, *Assistant to Editor-in-Chief*.....Chicago, Ill.

BOARD OF EDITORS

EUGENE C. GERHART.....Binghamton, N. Y.
E. J. DIMOCK.....Washington, D. C.
REGINALD HEBER SMITH.....Boston, Mass.
WALTER P. ARMSTRONG.....Memphis, Tenn.
THOMAS B. GAY.....Richmond, Va.
CARL B. RIX, *President of Association*.....Milwaukee, Wis.
HOWARD L. BARKDULL, *Chairman House of Delegates*.....
.....Cleveland, Ohio

General Subscription price for non-members, $3 a year.
Students in Law Schools, $1.50 a year.
Price for a single copy, 75 cents; to members, 50 cents.

EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *The 350 Hearing Examiners*

Judges and lawyers who wish to be considered for appointment as one of the 350 Hearing Examiners under the Administrative Procedure Act will be interested in the information presented in this issue.

Such impressions as can be formed from the matters thus far reported may be summed up as indicating that —although some progress has been made in the direction of seeking impartiality, training, experience, and independence of control by agencies or preconceptions —such an end-result is by no means assured. To end the entrenched system against which the Act was directed seems to be hard going.

The United States Civil Service will select the eligibles and the agencies will either choose the Examiners who fit their concepts or wishes as to what these officers should be, or will blindly reappoint those in office who meet the Civil Service Standards. Of course some of the agencies prefer and seek well-qualified incumbents for these truly quasi-judicial posts. Others will stick to party or ideological lines. Some groups of Examiners, and some individual Examiners, are known for their fairness and their regard for the evidence. Others have been better known for different characteristics.

There will be reappointments of Examiners now in office, and some of these will be below par. Experience in the office will be given a favorable rating, even where it is long experience in being unfair and non-judicial. The doors are not closed to the qualification of men of impartiality, experience, and tested independence.

An important thing may be the making of a significant change in the Examiner system. This the Act does. Even a poor and biased Examiner is likely to be more of a man in his job if he has security of tenure and compensation. Perhaps the most interesting development so far is that most or many of the Examiners are beginning to see an opportunity for them to become "administrative judges" in a better sense of those contradictory words. "You can almost see the robes they have put on, in their minds," said a trial lawyer for an agency, a few days ago, concerning his agency's Examiners. "They think they are judges already—next they'll be putting on wigs," he added, with a manifest exaggeration of a trend which had not escaped him.

So progress is being made. The system is being changed and improved even if impartiality and freedom from bias are not being assured. The most important change is taking place in the minds of the Examiners themselves. They may embrace the opportunity to do an independent and honest-minded job according to the true weight of the evidence—a job worthy of men vested with a judicial function. Why should any Examiner wish long to be or do less?

■ *Making Lawyers out of Law Students*

The survey of our profession, which is soon to proceed, is bound to bring some challenging questions, perhaps disturbing disclosures. The adequacy of the training and practical preparation which is given to law students, before they are given the privilege of practising as lawyers for clients, seems likely to be one of the controversial issues.

John S. Bradway, Reginald Heber Smith, and others, have been working intently on that issue, to find the means of closing the gap. Bradway's book, *Clinical Preparation for Law Practice,* is reviewed in this issue. The suggested solutions are along the lines of utilizing the law students in essential work for the profession and the public, and of giving them practical experience in handling the problems of clients before they are given the privilege of practice as lawyers "on their own".

Three recent outstanding performances of duty by American lawyers may have a significance in that connection—Robert H. Jackson as Chief Counsel at Nuremberg, James F. Byrnes as Secretary of State, and Warren R. Austin as Chief Delegate of the United States to The United Nations. With our many law schools and intensive studies of legal education, is it merely accident that these three most conspicuous legal posts were filled by lawyers who hold no law school degree but learned their law "in the hard way", through studying in law offices and learning about law practice while they pored over their books? Did these men gain from their legal education in busy law offices some qualities and skills that have carried them to the fore?

How can "clinical" preparation for law practice best

be fitted in with law school education, to produce lawyers who are well-rounded and fully-equipped to serve their clients and the public?

World Peace Through Law: A Second Effort

By the time this issue reaches the desks of our readers, the second great effort by the American Bar Association in support of world peace through law will have been launched.

The Regional Group Conferences in Boston, Washington and Raleigh will have been held. Similar meetings will follow in twenty-five other cities extending across the continent. Thereafter, the Canadian Bar Association will conduct its Group Conferences from Halifax to Vancouver.

These Conferences are called together in each city by (in most places) two conveners. The number of participants in each region is from twenty-five to thirty. Thus this plan brings together, for an all-day discussion, an aggregate of about one thousand lawyers in North America.

Judge Manley O. Hudson, who is Reporter to your Association's Committee on Peace and Law Through United Nations, and Mr. Louis Sohn, who is Assistant Reporter, attend all meetings, and lead the discussion in the same way that a good law teacher conducts a seminar class in accordance with the case system. The participants have received all the basic material in advance of the meeting so that they can prepare themselves, "bone up" as we used to say in law school, not only in order to understand, but also so that they may ask questions—which is their right.

Because the discussion is a real give-and-take, it is an educational experience of the highest order. Not only for the participants, but also for the mentors as they themselves have often pointed out. In fact, the chief reason they accept their arduous responsibility is that they find in their colleagues the opportunity for an honest exchange of views which is mutually enriching.

International law is not static; it advances as the conscience of mankind advances. The greatest leaders of international jurisprudence are those who keep most closely in touch with the conscience of the rank and file—the troops who have to be relied on to win the battles and move forward the standards.

In America we use the homely but vital expression "grass roots opinion". It means the same thing. It means that we advance as the men who have their feet on the ground come to believe that something is right and therefore must be accomplished. They want it explained to them in terms of values they will fight for—the women they love, their children, their homes, their land. The relationship is as close as life and death, but it must be interpreted in human terms, just as John Hersey changed Hiroshima from statistics into personal tragedies which made us all aware that, irrespective of nationalities, we stand in the presence of awful forces of daemonic destructive power.

It is the prerogative and opportunity of American lawyers to give this explanation and interpretation, each in his own community, to his own fellow-citizens who have come to know him by his works, and who, therefore, respect and trust him.

If there still be those who have not yet become aware of the fast mounting power of the organized Bar, let them observe this actual phenomenon of a thousand of the busiest lawyers in all parts of the continent, rallying together at their natural centers, giving generously of their time before, during, and after the Conferences solely because of their belief in *law* as the chosen instrument of civilization. They feel, in their inmost being, that they are both disciples of the law and the appointed preachers of its gospel.

The only sad note is that more men wish to attend these Group Conferences than can be accommodated this year.

If we accept free discussion—mutual enlightenment—as the objective, and accept one full day's session as all we can fairly ask of hard-driven practising lawyers, then the number of participants is necessarily limited. With too many men the whole plan breaks down, because genuine discussion has become impossible. Actual experience has proved that twenty-five is the optimum number.

But even this drawback is temporary. The American Bar Association has enlisted for a campaign of at least three years' duration, and it has pledged the skills and resources of all its Sections and Committees.

Every member of the Association who desires to take part will be welcomed and can find a useful place. The Section of International and Comparative Law has more work to do than all of us could hope to accomplish in all our lifetimes; it needs recruits because of the importance and vastness of its field, and it is geared to afford the right places to the right men. Other Sections and Committees find themselves more and more drawn into the orbit of the international current of affairs. Men may well consider if their interest may not find its best expression and be best channelled through the Section or Committee in which they are already influential members.

It is a great campaign. Its objective is to eliminate war from this earth by *outlawing* it. The strategic plan is sound. As Sir Cecil Hurst, Judge of the Permanent Court of International Justice, said in his address to the Grotius Society last October, the time is not yet ripe for action by governments, and, on the other hand, the progressive development of international law cannot be brought about by solitary scholars in ivory towers. It can be developed now only through group action by professional bodies such as Bar Associations.

The campaign's hope of success is that it is based on truth, on experience, and on the instincts that lie deepest in the hearts of men. The obstacles are so formidable

that they are terrifying. At times they seem to be in the ascendant.

It has always been so. On a world scale we are challenged to assert the supremacy of law over national sovereignties in international affairs just as Chief Justice Coke asserted its prevalence in the kingdom over the then sovereign, King James.

That great positive assertion, which marked a turning point in the history of the supremacy of law, has been handed down to us in these words:

Non sub homine, sed sub Deo et lege.

■ A Great Teacher Will Retire

Despite full realization that such things have to come to pass with the years, there will be widespread and deep regret, wherever law is respected and scholarship is cherished, that America's foremost legal scholar and teacher, Dean Roscoe Pound, of Nebraska and the world, is to retire from his teaching duties at Harvard University in June. The announcement is on page 234 of this issue. A notable volume which legal scholars of the world prepared in honor of his seventy-sixth birthday is reviewed by Dean Arthur T. Vanderbilt on page 256 of this issue.

A year ago, the cover portrait and accompanying sketch of our March issue were in personal tribute to this eminent scholar, beloved friend, and unflagging foe of arbitrary power and totalitarian concepts of law. The particular occasion was his projected trip to China, in his seventy-sixth year, to advise as to the reorganization and restoration of its judicial system. He went on that great mission to that troubled country, did what he could against the obstacles of its stricken economy and its contending ideologies, and came back to his teaching.

Now his voice and his learning will be heard in classrooms no more. It has been an inestimable privilege to have lived in the generations in which he struck mighty blows for law and justice, and to have worked at his side in great causes. A grateful profession hopes for him leisure and long life in good health. We know that his indefatigable mind and pen will not be idle, and that his voice will often be raised in behalf of laws and institutions which let men be free and vouchsafe to them full enjoyment of their liberties.

■ Attendance at Regional Meetings

Our Association has launched a series of Regional Meetings to constitute "local Assemblies" of the Association, leading up to the Annual Meeting of each year. The first was held in Omaha, Nebraska, on January 24 and 25. The second will he held in Jacksonville, Florida, on May 2 and 3, as is announced elsewhere in this issue.

An amendment of the Constitution makes these Regional Meetings an integral part of the Association's structure (February issue; 33 A.B.A.J. 183). The Omaha meeting was considered to be very enjoyable and worth-while, by those who attended. The idea and plan are of course sound, because no large percentage of our 40,000 members ever find that they can come to an Annual Meeting. The registered attendance in the years before war broke out in the world:

1936	Boston	3268
1937	Kansas City	4172
1938	Cleveland	2706
1939	San Francisco	2674
1940	Philadelphia	2316

Attendance at the Annual Meeting swung back toward normal in 1946, with 1621 registered at Atlantic City, and will go much higher at Cleveland in September. Nevertheless, the Regional Meetings are bound to afford to a large majority of our members their best opportunity to take a personal part in Association work and enjoy its opportunities for broadening acquaintance and ideas.

How to make the Regional Meetings of maximum interest, appeal and usefulness, to the rank and file of Association members, is a matter on which experimentation and experience will have to develop and point the way. The attendance at the Omaha meeting suggests that the answers have not been fully found:

State	Total Association Members	Attendance in Omaha
Nebraska	351	
From Omaha		107
Outside Omaha		83
Iowa	496	39
Kansas	396	14
Missouri	1320	28
Colorado	460	7
Minnesota	704	6
South Dakota	160	11
North Dakota	93	
Montana	179	
Wyoming	85	
From Other States		14
Total	4244	309

A month before, during the holiday season, the Iowa State Bar Association conducted at Des Moines its annual three-day Tax School. More than 700 lawyers attended. This was more than one-third of the Association's membership. As reported in our February issue (page 179), the program had been prepared so as to be of the greatest possible usefulness to the average practising lawyer. When their experience with past meetings told them that they could not afford to miss the next one, the members of the State Bar Association came—more than a third of them.

It may well be that the program-builders for the Regional Meetings will have to build a like tradition

of practical usefulness and indispensability. Our members seem to want—and need—*specific help* on their complex legal problems today, in the many new fields. The programs for the Regional Meetings are being wisely slanted in that direction.

Fundamentals of Government Debated

Despite the critical situations in international relationships and the many major issues of domestic policy that press for legislative answers, the Congress and people of the United States are about to engage in the serious consideration of two questions of basic law that go deep into the American structure of constitutional government. If these can be considered and decided on their merits, as now seems to be indicated, and without partisan divisions or personal recriminations, the great debate will be wholesome, in that it will re-kindle public interest in fundamentals that are too often taken for granted.

From President Truman comes a reiterated recommendation that the Congress amend the statute, enacted in 1886, fixing the succession to the presidency. Such a reconsideration most commonly arises when, as now, a President has died in office and has been succeeded by the Vice-President. Under the present law, members of the Cabinet, beginning with the Secretary of State, successively fill the office, in the event that both the President and the Vice-President die. In view of the character of warfare in the atomic age, the question of succession might become important.

President Truman urges that "in effect, the present law gives me the power to nominate my immediate successor in the event of my own death or inability to act." He believes this to be incompatible with our form of government; the office of the President should be filled by an elective officer.

In his message of June 19, 1945, President Truman recommended that the Congress enact legislation placing the Speaker of the House of Representatives first in order of succession and, if there were no Speaker or if he failed to qualify, that the President Pro Tempore of the Senate should act until a duly qualified Speaker was elected. A bill (H.R. 3587) providing for this succession was introduced in the House of Representatives and was passed by the House on June 29, 1945. It failed to pass the Senate.

Whether the line of succession should be headed by a Congressman who was elected by the voters in a small district in one State and has risen to be Speaker through the operation of seniority as a considerable factor, presents a question which goes deeper than may appear at first impression. The President *pro tem.* of the Senate has been elected by the people of a State. Important considerations are that the succession be fixed in advance and without reference to personalities; time would hardly permit a selection by the Congress after the emergency arose. President Truman declares for the principle that only an official elected by the people should succeed—not an appointee of a deceased Vice-President who has become President.

The other pending proposal emanates from the majority party in both Houses of the Congress. It is to prohibit a President from being eligible to re-election after he has served two terms; in the case of a Vice-President succeeding to the presidency, after he has served an elective term in addition to the unexpired term of his predecessor. In the Senate Resolution, this ineligibility of a Vice-President would arise only if he had served a year or more of an unexpired term of his predecessor.

Under the House Resolution, the amendment would be submitted to the State Legislatures for ratification. Under the Senate form, a special constitutional conven-

tion elected for the purpose in each State would determine the ratification or rejection. It is urged that the Senate provision would tend to assure action for or against the amendment and would carry the issue more directly to the people.

The limitation of the presidency to two terms is an historic and recurring issue in American constitutional history. It involves deeply our concept of the presidency and its function. It should not be controlled by partisan or personal resentments or adulations. If the amendment is submitted to the States, it will be a great issue on which lawyers should take the lead in presenting the pertinent questions fairly to the people.

We do not at this time review the arguments for or against the amendment. The House of Delegates has not determined the Association's stand on its merits. If the solemn referendum to the States and the people takes place, we shall try to secure for our readers a reasoned study of the opposing views.

A second proposal of constitutional change, which commands attention because of its influential sponsor, was submitted on February 19 by Senator Arthur D. Vandenberg, of Michigan. It would forbid the denial or abridgement, by the United States or any State, on account of age, of the right of citizens to vote when they are eighteen years of age or older. Ratification by State legislatures within seven years is specified; otherwise, the submission becomes inoperative. This proposal will undoubtedly encounter opposing views, if it is referred to the States. The slogan in its favor is a question: "Can you say that a young man or woman is too young to vote if you say that he or she is old enough to fight for their country?" Against it will be urged a claim that it is a further step toward "pure democracy" rather than representative government in its republican form.

Editorial From a Member of Our ADVISORY BOARD

■ *Veterans Charged with Crime*

There is a serious challenge to those of the law to provide immediately a program for handling cases of veterans brought before the Courts upon charges of crime. These cases are numerous and are growing. They are not being handled with the discernment required to deal fairly with those who fought under fire in the frightful holocaust of the late World War.

Legislators have provided effectively a GI Bill of Rights. Provisions have been made for unemployed veterans, for college educations of veterans at the expense of the Government, and adequate hospitalization for those physically injured during war service. But the veteran haled before the bar of justice on criminal charges deserves more investigation, as to his war background, than he is likely to receive now.

He may be a villain; and in such case, the mere fact that he is a veteran should not deter just punishment. But if fair investigation indicates that the commission of wrong by a veteran is reasonably traceable to or can be associated in some manner with his harrowing experiences in fighting for his country, the case demands special treatment. The investigation should extend to all of the veteran's war experiences, his hospitalization and treatments for any cause during and following the war period.

In any case where the slightest suggestion is made for the need of it, he should be examined by psychiatrists and physicians before being tried. If it is found that he should be restrained to protect the public and his is a case arising by reason of a malady or injury suffered during the war, the place of restraint should be such as to permit rehabilitation under pleasant surroundings.

In September of 1941, a Committee of seven Federal Judges was appointed, of which Judge John J. Parker, of the United States Circuit Court of Appeals for the Fourth Circuit, was named Chairman, to study the problem of crime correction. After intensive study and investigation, bills were prepared and were introduced in the Congress to provide a program for treatment of youth offenders along lines successfully practiced in England. As now set up, the bills would provide appropriate care for veterans in many instances, and they well might be extended to provide the study and treatment required in all criminal cases where veterans are involved. These bills should be vigorously pressed for passage by the Congress without delay.

It is the profound obligation of leaders of the Bar, of judges and lawyers of high estate and vision, no matter how great the pressure of other business, to endeavor to provide immediately a program dealing with this situation. When members of the Bar assume this type of leadership, they build a temple of mercy, as well as of justice; they deal in spiritual qualities and work in a field far beyond the common run of property and finance; and they measure in the highest degree to the ideals of the profession.

Washington, D.C. BOLITHA J. LAWS

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Editor to Readers

■ The mid-winter meeting of the House of Delegates, about mid-way in the Association year, convened at the Edgewater Beach Hotel, in Chicago, on February 24-26. Unfortunately, these sessions open at the time our present issue "closes forms" and goes to press. So we cannot give much of the news and the votes of that meeting, before our April number. Brief notice of nominations for officers and members of the Board of Governors is given on page 291. Perhaps sometime the calendar-makers for convocations of the Association will select dates which enable the JOURNAL to report the sessions promptly to our membership.

• • •

With the vital issues as to how men who attend law schools can be trained and equipped to be well-rounded lawyers coming rapidly to the fore through the projected survey of the legal profession, the Association's declaration for the continuing education of the Bar, and the Association's efforts to solve the problems of making competent legal service available to persons of moderate means, there should be general interest in John S. Bradway's book on *Clinical Preparation for Law Practice*. It is reviewed and quoted from in "Books for Lawyers", elsewhere in this issue. The ruling by the Veterans' Administration has challenged present systems of preparation. Law school deans and professors, Bar examiners, the editors of law journals and periodicals, and members of the profession generally, may best face the issues and come to grips with them. Messrs. Bradway and Smith have done a lot of work in this field, ever since they published *Growth of Legal Aid Work in the United States*. They have *an* answer. It may not be perfect, but it is realistic and honest. It would seem to be effective as far as it goes; it can be expanded. Theirs has been pioneering work of the most useful sort. No one will do well to "throw cold water" on it until they offer something better, to round up the preparation of law students to be real lawyers.

• • •

"I read the JOURNAL from cover to cover". "With all that is going on nowadays that is so important to the profession, our country, and the world, I do not fail to read or look through everything that you think is worth publishing." Avowals such as these recur in what is said and written to your Editors. The compliment is pleasing, of course, but we give it a greater significance. We suggest that no member of our Association can now wisely limit his interests and his reading, in the JOURNAL or anywhere else, to merely the things which he finds diverting and enjoyable and the things which directly concern his professional work for clients. Our Association is engaged in many-sided work for the profession and the public; it is on many battlefields and has numerous front-lines of effort. All members of the Association ought to keep informed as to all that is going on, not alone as to activities which seem to affect their "bread-and-butter". The fact is that in all branches of the profession including its specialities, and in all parts of the United States, the future of law and lawyers will be vastly affected, by what is taking place in our country and in the world. Unless the lawyers keep abreast of these things and help our Association and our leaders in public office cope with them, some rude shocks and readjustments lie ahead, for an historic profession. Your JOURNAL is not doing and publishing all it ought, but we are trying to devote our space to articles, news and editorials which we believe to be worth the time and thought of all our member-readers.

• • •

Our editorial contributed this month by a member of our Advisory Board is by Chief Justice Bolitha J. Laws, of the United States District Court for the District of Columbia. As last retiring Chairman of the Section of Judicial Administration, he is continuing his activity in behalf of the Section's numerous projects, one of the most notable of which is a committee of prominent laymen who cooperate with judges and lawyers to improve the administration of justice. Robert V. Fleming, President of the Riggs National Bank of Washington, D. C., who was one of the closest friends of the late Frank J. Hogan, is heading and leading this Nation-wide cooperation. Judge Laws' editorial proposes a program for the handling of criminal cases in which veterans of World War II are accused. Members of the Section of Criminal Law, and all who feel the profession's responsibility for better administration of justice in criminal cases, will be interested in his proposal, which also is challenging to the leadership of our Association. Through these contributed editorials from members of our Advisory Board there is achieved a diversity in the expression of the views and interests in the profession, as well as in geographical representation, not hitherto reflected on our editorial pages. The publication of "Letters to the Editors" contributes to the same objective.

• • •

Under the title, "The American Bar Association Looks Ahead", the January issue of *The Canadian Bar Review* (Vol. XXV – No. 1; pages 71-74), official organ of the Canadian Bar Association and learned adjutant of the legal profession in Canada, republishes in full from our November issue (page 723) President Carl B. Rix's statement of the accomplishments of our Association and of the tasks that lie immediately ahead. "It is a record of achievement of which the American Bar Association may well be proud and an inspiring call to still greater effort in the future", says our esteemed contemporary. Our readers may well turn back to and re-read President Rix's declaration on taking office, to confirm that the promises are being fulfilled.

13

"Books for Lawyers"

INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: *Essays in Honor of Roscoe Pound. Edited, with an Introduction, by Paul Sayre. New York: Oxford University Press. 1947. $12.50. Pages ix, 807.*

This attractive volume was intended as a tribute to Dean Pound on his seventy-fifth birthday in the fall of 1945. War conditions delayed its presentation to him until his return from China, where he had been directing a reorganization of the entire legal system. With the announcement of his coming retirement from teaching, this tribute has an added timeliness.

Dean Pound has played so prominent a part for so long a time, in the American legal scene, that we are all too likely, unless we have read appreciations of his work such as that by Sir Maurice Sheldon Amos in *Modern Theories of Law*, to be unaware of the extent of his influence on the law throughout the entire civilized world. According to Sir Maurice, "Mr. Justice Holmes, no mean judge of human values, has said of him that 'Pound is a uniquity' ". So true is this and so varied and rich are the contents of the thirty-eight essays which comprise the volume, that I fear "the Schoolmaster of the American Bar" is alone qualified to review the volume adequately. The average reader will soon discover, if I may paraphrase a bit, that there are more things in the law, Horatio, than are dreamt of in your philosophy.

Drawn from five continents, these essays are no mere garland of asphodel for the outstanding legal scholar of the world, nor are they an olla-podrida of ephemeral utility. Here are gathered together some of the best fruit of reflective scholarship on the philosophical side of the law over the past quarter-century. Not every one of the essays, to be sure, has the characteristic that has permeated Dean Pound's writing, of bringing to bear all of his great wealth of learning to the solution of practical legal problems. Of the ivory towers occasionally presented by the volume, it can indeed be said that they are intriguing ivory towers.

Only the introduction by the Editor and two essays out of the thirty-eight relate directly to Dean Pound. His career as a practicing lawyer, an appellate judge, a law school teacher and dean, has been sketched by the Editor, Professor Paul Sayre, who concludes: "Law teachers in all law schools, practicing lawyers, and judges, are moving to the rhythm of Pound's thought, although perhaps not always consciously." An intimate view of his varied intellectual interests is given by Professor Albert Kocourek, who has done well to recall Dean Pound's address before the American Bar Association in 1906 on "Causes of Popular Dissatisfaction with the Administration of Justice" in which he dealt with the "spectacle of law paralyzing administration." This address, as Kocourek says, was a definite turning point in Pound's career. How it angered the high priests of conservatism and shook them from their complacency is recounted in an eloquent introduction to the address which Dean Wigmore wrote thirty years later for the *Journal of the American Judicature Society* which is fittingly reproduced in Professor Kocourek's article.

Professor Edwin W. Patterson has contributed to the volume a valuable commentary on *Pound's Theory of Social Interest*. The extent of Pound's influence is aptly summarized in the concluding sentences of the essay: "When I began the teaching of law nearly thirty years ago, Pound's writings were, among contemporaneous American legal literature, virtually the only attempts to probe the basic policies of the law and to give it meaning in terms of value. That many of the ideas which he originated or at least sponsored have become common-place is a tribute to the insight and vision of his theory of social interests." If any one of Dean Pound's numerous essays may be singled out as embodying the essence of his philosophy of law, it is his *Theory of Social Interest*. Although it is not bed-time reading, I have long thought it should be drawn to the attention of prospective law students, so that they might have a preview of just what it is that our legal system is attempting to do.

What shall one say of the other essays, seven from England, four from Latin America, three from Europe, two from Australia, one each from South Africa and Scotland, eighteen from this country, if one accepts the geographical locations indicated by the table of contents, although obviously more than one contributor accredited to England and the United States owed his intellectual origin to the universities of Europe? To comment upon particular articles would be but to reveal one's personal interests, to fail to comment but to disclose one's limitations. The variety and richness of the feast set before us are attested by the names of Carleton Kemp Allen, Warden of Rhodes House, Oxford; Arthur L. Goodhart, Professor of Jurisprudence, Oxford; H. C. Gutteridge, Emeritus Professor of Comparative Law, University of Cambridge; J. Walter Jones, Fellow

of Queens College, Oxford; A. Meyendorff, formerly Reader in Russian Institutions and Economics, University of London; Percy H. Winfield, Rouse Ball Professor of English Law, Emeritus, University of Cambridge; and Lord Wright, Lord of Appeal in Ordinary and Chairman of the United Nations War Crimes Commission, from England; of Ranyard West, Lecturer in Social Psychology, University of Edinburgh, from Scotland; of Sir Frederic William Eggleston, Australian Ambassador to the United States, and Julius Stone, Professor of Jurisprudence, University of Sydney, from Australia; of Elmer Balogh, Professor of Law, University of Witwatersrand, from South Africa; of A. S. de Bustamante y Montoro, Professor of the Science of Law and of Philosophy of Law, University of Havana; Carlos Cossio, Professor of Law, University of Buenos Aires; Enrique Martinez Paz, Professor of Juridical Philosophy and Comparative Civil Law, National University of Cordoba, Argentina; and Luis Recasens Siches, Professor of Legal Philosophy, National University of Mexico, from Latin America; of Giorgio Del Vecchio, Dean of the Law School, University of Rome, from Italy; of Vilhelm Lundstedt, University of Upsala, and Karl Olivecrona, Professor of Law, University of Lund, from Sweden; and of Huntington Cairns, General Counsel, National Gallery of Art; Anton-Hermann Chroust, formerly Research Fellow, Harvard Law School; Thomas A. Cowan, Professor of Philosophy, University of Nebraska; Jerome N. Frank, Judge of the United States Circuit Court of Appeals, New York City; Mitchell Franklin, Professor of Law, Tulane University; Jerome Hall, Professor of Law, Indiana University; William Ernest Hocking, Alford Professor of Philosophy, Emeritus, Harvard University; Werner Jaeger, University Professor, Harvard University; Hans Kelsen, Lecturer in Political Science, University of California; Max M. Laserson, Columbia University; C. H. McIlwain, Eaton Professor of the Science of Government, Harvard University; Alfredo Mendizabal, formerly of the New School for Social Research, New York City; Max Radin, Professor of Law, University of California; Max Rheinstein, Max Pam Professor of Comparative Law, University of Chicago Law School; Helen Silving, New York City; Pitirim A. Sorokin, Professor of Sociology, Harvard University; N. S. Timasheff, Professor of Philosophy, Fordham University; and Arthur von Mehren, Harvard Law School.

Here is a volume that no man can read and still think of the profession of the law as a mere trade.

ARTHUR T. VANDERBILT
Newark, New Jersey

TOUCHED WITH FIRE. *The Civil War Letters and Diary of Oliver Wendell Holmes, Jr. 1861-1864. Edited by Mark DeWolfe Howe. Cambridge, Massachusetts: Harvard University Press. 1946. $3.00. Pages 152.*

No one, I think, expected Justice Holmes' Civil War letters or diaries to show up. He had not concealed the fact that he had destroyed his early papers. So when John G. Palfrey, his literary executor, and Mark Howe, his accredited editor and biographer, found some letters and part of a diary at the bottom of one of the boxes in which the Justice's papers had been kept, they were agreeably surprised. It was evident, Mark Howe says, that the Justice had gone over them carefully. We may therefore take it that he wanted you and me to read them. I am glad he did.

There are not many, these forty or so letters home to his father and mother, one to his sister Amelia (which, he writes, started as a letter to another girl), and only some forty odd entries from his diaries. At first reading they are just such letters home and just such a diary as so many of our young men wrote in 1861-5, in 1917-18, and in 1941-5. "I really very much doubt whether there is any regiment which can compare with ours in the Army of the Potomac". "The Army is tired with its hard and its terrible experience and still more with its mismanagement". Holmes was a fairly typical—superior, if you please—young man, one of those splendid, sensitive, intellectual, and promising young men, of whom we have lost so many; an aristocratic young man; a thoughtful young man; a Bostonian from the edge of the Boston Common; a Harvard man, just such a one as his Harvard classmates have before and since chosen to be their class poet; a Porcellian. And a very young young man. I defy the reader, if he had not been told, to discern in this book the man who was to be the greatest of our judges.

To be sure, there are phrases, uncommonly good phrases: "I have a jewel in the head of this campaign in the shape of my adventure Sunday week ago", which came natural perhaps from a boy who had read his "As You Like It". There are glints, sparks that later burst into fire, but scarcely discernible unless you had seen the flames:

"Of course when I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was en route for Hell came up with painful distinctness." Whose eye would be caught by this unless he had read the *Collected Legal Papers*.

" I used to say, when I was young, that truth was the majority vote of that Nation that could lick all others, ... and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view. . . . . If I am in a minority of one, they send for a doctor or lock me up."

Yet, though you may not be able to see the Justice in this young man, you will never be able to understand the Justice without reading these youthful letters of his. Mark Howe, in his preface, says that their contemporaneous meaning is not the only significant meaning, and that "it may well be that of the two wars,

the war in fact and the war in retrospect, it was the latter which was dominantly formative of his philosophy". He goes on to say that this question cannot profitably be discussed on the basis of the materials in this volume alone. The reader will find it hard not to try.

Holmes never glorified, even in retrospect, the realities of war. Holmes never forgot, there was never quite out of his mind, the harsh horror, the reptilian realities of war. "War, when you are at it, is horrible and dull", he said on a Memorial Day a generation after the fact. No; it was not war itself which he glorified, but war as a challenge. "Its *message* was divine", he went on to say in that Memorial address. The importance of this little book lies in what it tells us of that message, and it tells us enough, I think, to give us a clue to the formation of the Justice's philosophy of life.

His first combat experience was at Ball's Bluff, just across the Potomac from Washington. There he got his first wound, only a few months after he had been graduated from Harvard, only a month or so after his regiment had reached Washington. The young Holmes was none too sure — and who is? — about how he was going to behave under fire. "I can't write an account now but I felt and acted very cool and did my duty I am sure. Whatever happens," he wrote home from the hospital, "I am very happy in the conviction that I did my duty handsomely".

This was the first of his three wounds, and it took him very close to death. The second risked losing a leg, and the third was through his neck. Wounds, dysentery, and hard fighting for three years, turned the young Harvard man into a professional soldier.

The pungent message of war, what Howe calls his "war in retrospect", was the discovery that Holmes found in himself the necessary courage and the requisite tenacity, without prompting or comfort from any outside source. He learned from war that he was capable by himself of conquering what he feared and hated. He not only solved the conflict between the anxiety of fear and the duty of bravery. He solved it without ideological comfort or support.

When he was nearly dying of his first wound, the reflection that he might be "en route for Hell" raised in his mind an impulse to recant his philosophy, "but then I said: 'By Jove, I die like a soldier anyhow — I was shot in the breast doing my duty up to the hub — afraid? No, I am proud.'" A year later he writes home: "It is rank folly pulling a long mug every time one may fight or may be killed — very probably we shall in a few days, and if we do, why, I shall go into it not trying to shirk the responsibility of my past life with a sort of deathbed abjuration".

In May of 1864 he writes: "I have felt for some time that I didn't any longer believe in this being a duty, and so I mean to leave at the end of the campaign, as I said, if I am not killed before". And when he finally decided to resign his commission, he wrote his mother: "I started in this thing a boy; I am now a man; and I have been coming to the conclusion for the last six months that my duty has changed. . . I honestly think the duty of fighting has ceased for me — ceased because I have laboriously and with much suffering of mind and body *earned* the right, which I denied Willy Everett, to decide for myself how I can best do my duty to myself, to the country and, if you choose, to God —".

The war had made Holmes into a man. He had gone into it pretty sure he did not know. He learned from it that he did not need to know. War had brought him what Holmes later called The Soldier's Faith. In that same Memorial address, when he recalled how horrible and how dull war is when you are at it and that only when time had passed could you see that its message was divine, he explained: "I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, what no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use." "If you have been in line. . . if you have ridden by night at a walk toward the blue line of fire at the dead angle of Spottsylvania . . . . if you have been on the picket line at night in a black and unknown wood . . . . if you have had a blind fierce gallop against the enemy, with your blood up and a pace that left no time for fear — if, in short, as some, I hope many, who hear me, have known, you have known the vicissitudes of terror and of triumph in war, you know that there is such a thing as the faith I spoke of. You know your own weakness and are modest; but you know that man has in him that unspeakable somewhat which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief."

He had found that unspeakable somewhat in himself, and this blind belief, this Soldier's Faith, grew to be his philosophy. John Dewey in his book *Experience and Nature*, "gladly borrows the glowing words of one of our greatest American philosophers." It is Holmes: "That the universe has in it more than we understand, that the private soldiers have not been told the plan of the campaign, or even that there is one . . . has no bearing on our conduct. We still shall fight — all of us because we want to live, some, at least, because we want to realize our spontaneity and prove our powers, for the joy of it; and we may leave to the unknown the supposed final valuation of that which in any event has value to us. . . . Philosophy opens to the forlorn hopes on which we throw ourselves away, the vista of the far-

thest stretch of human thought, the chord of a harmony that breathes from the unknown."

Here then in this small book we have the springs from which later flowed Holmes' philosophy. As he fifty years afterwards told the Harvard Law School Association: "I was walking homeward on Pennsylvania Avenue, near the Treasury, and as I looked beyond Sherman's Statue to the west, the sky was aflame with scarlet and crimson from the setting sun, . . . I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars."

CHARLES P. CURTIS, JR.
Boston, Massachusetts

THE NEW TRADE-MARK MANUAL. *By Daphne Robert. Washington: The Bureau of National Affairs. 1947. $6.50. Pages xxi, 375.*

It is appropriate that this analysis of the new federal trade-mark statute of 1946, known as the Lanham Act (see, also, 33 A.B.A.J. 144) should be written by Miss Robert. Her long experience as a lawyer specializing primarily in the law of unfair competition, and particularly as to trade-marks, and her intimate contact with and participation in, the laborious process of drafting the bill in its various forms, and in the legislative history of the bill, well qualified her to write this volume which she modestly calls a "manual."

The analysis of a law designed to codify many of the provisions of the existing federal laws pertaining to trade-marks and also in effect to "exhaust" the power of the Congress to legislate on the subject of trade-marks, and thereby to recognize and coordinate the rights of trade-mark owners under existing laws, is a formidable undertaking. Miss Robert's treatment of her subject is comprehensive as well as remarkably free from inaccuracies. As to a voluminous Act of this character, lawyers inevitably differ as to the interpretation of some of its provisions. Recognizing such differences of opinion, she has the courage to express some of her own ideas, while pointing out the possibility that the Courts and the Patent Office may arrive at different conclusions.

Subject to the limitations of her subject, Miss Robert discusses the provisions of the new Act in a style which is interesting to laymen and useful to the general practitioner as well as to the lawyer who has a specialized practice in the field of unfair competition and trade-marks. Her observations as to existing laws or principles are supported adequately by footnote citations.

At the end of her volume, there is a well-written history of federal trade-mark laws, including the Lanham Act, and also an Appendix which contains the full text of the new Act and of the prior federal acts and International Conventions as to trade-marks and unfair competition. The book contains also a learned and thought-provoking introduction by Edward S. Rogers, who discusses various international aspects of the Lanham Act. As to the enforcement of trade-mark rights in the United States, he makes the following observation:

> I suggest therefore, that the binding force of the decisions of the Courts of the various States with respect to unfair competition and the obligation on the federal Courts to apply them, supposed to result from *Erie Railway* v. *Tompkins*, are now removed. I suggest further that State decisions have been supplanted by the Conventions and the federal statute, and for the first time citizens of the United States are assured in federal Courts of effective protection against unfair competition by National law.

In her treatment of *Erie Railway Company* v. *Tompkins* as applied to trade-marks, Miss Robert seems not to go so far as Mr. Rogers. She says, as to unregistered marks (page 227):

> Even in cases where an infringing mark is used in interstate commerce, the relief granted by the federal Court is circumscribed by the law of each State where the infringement or other unfair trade practice is proved.

The author recognizes (pages 133 *et seq.*) that in view of the incontestability feature of the new Act, a user of a trade-mark must now watch his step. He cannot hereafter rely on any common law rights acquired by him in territory into which he has extended the use of his trade-mark after the publication of a conflicting federal registration that subsequently has become incontestable.

C. A. SOANS
Chicago, Illinois

CLINICAL PREPARATION FOR LAW PRACTICE. *By John S. Bradway. Durham, North Carolina: Duke University Press. 1946. $3.00. Pages x, 208.*

The rapidly increasing number of law teachers, Bar examiners, judges, and practising lawyers, who are determined to put a stop to the present hypocritical system under which the public is allowed to believe that, when the State admits a man to the Bar and licenses him as an attorney, it signifies he is fully qualified to practise whereas the whole profession knows the exact reverse to be the truth, will find comfort, inspiration and illumination in this book.

The honest equation is that education in a law school *plus* apprentice training *plus* passing the State's Bar examinations equals a lawyer. Eliminate apprentice training and there is a chasm.

In Professor Bradway's words: "Orthodox law school courses provide a foundation of unquestioned value. But the law student who receives his diploma must usually cross a substantial gap before he becomes the seasoned practitioner who inspires in his clients a reasonable amount of confidence. The Legal Aid Clinic course is one type of bridge." (page 3) The Legal Service Office for Persons of Moderate Means can be a companion bridge.

This short volume is the more persuasive because it is not a reform tract; it is not even "beamed" at the

groups I have enumerated. The book is written simply and solely for the guidance of young would-be lawyers who are about to learn to practise by *practising* under supervision, and whose training will be made more intelligent by *instruction* in the art of practice.

Many sincere educators ask: "Granted that something must be done, granted that legal aid and legal service offices possess excellent clinical material, how in the world can you teach or inculcate the art of practice in a student?"

John Bradway has spent the best part of his life finding out the answer and proving it.

The law teacher has felt that the old apprentice plan was too haphazard. If a law school graduated two hundred men and they were scattered in a hundred or more offices, how could it be possible to watch them, to supervise, guide and train them? Our Association has committed itself to *institutional* teaching and training.

The answer is that the legal aid offices are, and the legal service offices will be, institutions in exactly the same sense that hospitals are institutions.

Another question asked by educators is: "Will the clients present problems in the right variety of subjects?" The answer is that in learning to practise, the "subject" is of minor importance; what is important is the *client*. In law school, the student is confronted with cases in books; in the clinic he is confronted by human beings in person.

"When the student takes a course in contracts, he knows every case in the casebook is a contracts case. If the course is torts, the casebook is filled with torts cases. The client, however, does not have a label on his coat reading: 'I am a contract case' or 'I am a tort case.' " (page 73)

If the client says that a careless driver ran him down, the trained practitioner will think in terms of, and elicit the facts about, "negligence," "contributory negligence," and "damages"; but he will *also* ask if the client carries accident insurance.

Clinical instruction does not follow the "course" method but it does follow the case system. "There is no better mental exercise than becoming accustomed to a case method of study where all the problems arising are not in one field of law. It is in this process that the synthesizing effect of the Clinic work is most clearly shown." (page 29)

"So it is of minor concern that the daily routine of cases does not produce for each student an illustration from each field of law of his other courses, or that Legal Aid clients are uniformly poor people with the types of problems peculiar to poor people, or that a particular case may contain no question of law at all. We are here concerned with a different 'dimension.' The orthodox standards of value of law school courses are not controlling here. A gradual and developing process of student orientation is anticipated." (page 7)

To the practising lawyer, the nature and function of clinical training can be made plain by using a different approach.

"In a sense, the Clinic course is an aptitude test for law practice. The staff views the student from two standpoints: First, from the standpoint of the head of a large law office — if the student were a young lawyer trying out for a permanent place on the staff, would he be acceptable? Second, from the standpoint of the client — would the client bring a second case to the student after watching him handle the first?" (page 160)

Adapting Pound's famous phrase about "law in action," Professor Bradway says: "Part of the task of the Clinic is to introduce the student to the law office in action." (page 20)

The atmosphere or "climate" of the Clinic office is that of every busy law office. "It tends to break down the instructor-student relationship and replace it with a senior-junior law partnership arrangement. The attention of staff and students focuses upon one objective — more efficient service to the client. The result is a cooperative atmosphere in meeting problems seen to be mutual." (page 19)

The true secret of any art can never be pinned down in words, but the philosophy of the plan clearly emerges from the following sentences:

"The attainment of the foregoing objective calls for special types of bridge-building. Attention should be given to the teaching method; but the other side of the task — the learning process — should not be neglected. One assumes that this learning process consists of four general steps: A planting of the idea, observation as the instructor demonstrates how the idea functions in practice, participation by student under supervision for the purpose of gaining experience, eventual relaxation of the supervision so that the student acquires the necessary self-confidence to proceed on his own." (page 4)

"The seasoning process makes little headway if the student is merely a pair of hands or legs with all the decisions made for him. The Clinic work is planned to shift the burden gradually to the student's shoulders." (page 19)

Clinical training does not, in the pedagogical sense, teach either substantive or adjective law; it is not a review or follow-up of law school courses.

What clinical training *does* impart is some understanding of such vitally important factors as how to interview a client, how to prepare a case, how to plan a legal campaign, how to negotiate a fair settlement, how to try a case in court. It gets down to brass tacks on such mundane things as how to keep a decent record of a case, how to keep track of one's time, how to save time, how to dictate an effective letter, how to get the facts, and how to evaluate them.

Professor Bradway, as the Director of the Legal Aid Clinic at Duke University Law School, does his work quietly and thoroughly. He makes no claims. He lets the performance speak for itself.

If I may, for a moment, assume the role of protagonist, let me ask those who incline to criticize this clinical training idea what plan they have which is as effective? Does any law school teach any of its students how to settle a case fairly and ethically by using legal tools and resources? Does any modern law office let its neophytes interview the clients? What in the world is a young man to do who wants to hang out his own shingle – should there be no place where he can learn the rudiments that he must know?

The claim that our present system, or lack of it, does work somehow is admitted. Fine men go to fine law schools and ultimately become fine lawyers.

But it works in a clumsy, haphazard, tortuous way. It takes entirely too long. And it is dangerous.

The case for the apprentice method of clinical training is that the way to learn to do something is to do it. That is as true of law practice as of swimming, driving an automobile, playing bridge, growing vegetables and flowers. The further case is that the process can be facilitated by wise instruction; else why do our leading surgeons perform operations in a great amphitheatre filled with medical interns? The final claim is that men properly grounded by law schools in the science of law, will in an institutional type of office actually learn how to practise, and will learn it as rapidly as the complex nature of the process makes possible.

REGINALD HEBER SMITH
Boston, Massachusetts

SOUTHERN ORATORY. *By Francis Pendleton Gaines. University, Alabama: University of Alabama Press. 1946.*

One June day three years ago, I sat capped, gowned and hooded, on the campus of a Southern college, waiting to hear a graduating address. The summer sun and the unaccustomed regalia combined to create a drowsy discomfort which I had no reason to anticipate would be alleviated by anything the speaker might offer. No reason to anticipate because I only knew that the orator of the day was the president of Washington and Lee University, and a not inconsiderable experience had led me to believe that on such occasions most academicians either nearsightedly read a learned but dull discourse or indulge in what Disraeli called "the dreary drip of dilatory declamation."

What happened was something quite different. Dr. Francis Pendleton Gaines delivered one of the best—I am inclined to think the best—graduating addresses I have ever heard. As I listened all was forgotten but the speaker and his utterance. It was only later when I thought it over that I realized what qualities had produced the effect—appropriateness of thought, purity of diction, apt allusion and quotation, restrained humor, complete spontaneity, perfect timing, ease and grace of delivery. The only college president I ever heard give a comparable performance was when at Madison I listened to Glenn Frank as he told what he was trying to accomplish at the University of Wisconsin.

And so I read President Gaines' book to learn what an accomplished Southern orator thinks of his predecessors, what a master craftsman has to say of his art. I was not disappointed, for the four addresses[1] that comprise this slender volume are infused with the same qualities that so impressed me that June day on the campus. If there has been any more penetrating discussion of Southern oratory, it has not been my good fortune to see it.

Not only are the pronouncements of statesmen considered but the ubiquitous oratory of court-room, political stump and camp meeting. Two Negroes are included among the great Southern orators—Frederick Douglas and Booker T. Washington. Of Douglas I know only what I have read, but I can testify from personal experience that Booker T. Washington had few equals as an impressive speaker.[2] Of the court-room orators he names Seargent S. Prentiss as "chieftain of them all."[3] From this it is unlikely that there will be any dissent.

Dr. Gaines' purpose, however, was not merely to give random portraits of great Southern orators but to consider oratory as a factor in Southern life and to analyze the methods of those who effectively used it as their medium in influencing Southern thought.

Dr. Gaines starts from the reasoned premise "that oratory had peculiar dominance in the admiration, the aspiration, and probably the ultimate destiny of that section." (page 1) The "great torch flames" with the transcendence of Richard Henry Lee, and Patrick Henry—to Virginians their Cicero and Demosthenes. In comparing and contrasting Lee and Henry, Dr. Gaines strikingly points up the methods of the orator: Lee with "as fine and as full a preparation for a career of statesmanship as any American could ever boast . . . . perfectly sure of himself . . . . at home in all realms of history and of political philosophies . . . . the wisdom of a thousand sages at the tip of his tongue . . . . his voice noted for the soft and musical timbre, for the copiousness of volume together with all perfections of modulation . . . . so graceful his gestures that the sober-minded Edmund Pendleton once accused him of practicing before a mirror."[4]

Patrick Henry "quoted nobody; he had none of the smooth and oily graces of the diplomat; . . . he seemed depressed, frequently, as he took the floor—then there was the magic mo-

1. Delivered at Alabama College as the third series of Dancy lectures.

2. "Many intelligent Southerners, asked to name the most dramatic speaker who ever stood in a Southern pulpit, would unhesitatingly nominate John Jasper, the famous Negro of Richmond. . . . He may be remembered, moreover, merely for his delightful categories of God's favored people: 'De Huguenots and de Hottentots, de Abyssinians and de Vohginians.' " (page 9)

3. For a review of the latest biography of Prentiss, see the *Journal* for December, 1945; Vol. 31 at page 655.

4. It has been said that Winston Churchill so practiced in his early years.

ment . . . . he faltered until he warmed up, and then he made men's hair stand on end, men's blood run cold . . . ." He was "the divinely inspired apostle of the heroic spontaneities . . . . the pure genius of oratory."[5]

In the next generation "was that scintillating and enigmatic figure, John Randolph of Roanoke." He would come into the House of Representatives booted and spurred and sit as if in a coma; suddenly he would arouse himself and coruscate in lightning flashes. He was matchless in invective. Some of his epithets are a part of our literature. Of an opponent: "Like a dead mackerel in the moonlight, he shines and stinks." Of the alliance between John Quincy Adams and Henry Clay: "The coalition of Blifil and Black George . . . , of the Puritan with the black leg."

In the four decades that preceded the Confederate War "the torch flickers." The dominant voices were those of John C. Calhoun, Robert Toombs and William L. Yancey. Whatever of history and logic was on her side, the South in defending the existence and in advocating the extension of slavery was fighting against "the stars in their courses."

> When Achilles strives some vast rock to throw
> The line too labors and the words move slow.

Only after the war was "the torch renewed and enlarged." The first phase was the glamorization of the Confederate soldiers. "At this moment we may smile a little at the fulsomeness," says Dr. Gaines, "but for some of us, whose people they were, it is not altogether a matter of amusement. We still have a tightening of the heart cords at some of the tributes—however they may sound to the ears of detachment."

The real goal of the Southern orator of this era was that of reconciliation. Of all who essayed the task the success of none approached that of L. Q. C. Lamar. He was superbly cast for the role. He had been a colonel in the Confederate army and a member of the Confederate government. He had repeatedly defended Jefferson Davis in the Senate of the United States, once declaring: "The only difference between myself and Jefferson Davis is that his exalted character, his preeminent talents, his well established reputation as a statesman, as a patriot, and as a soldier, enabled him to take the lead in the cause to which I consecrated myself and to which every fiber of my heart responded." And when Senator George F. Hoar attacked Davis, Lamar retorted: "When Prometheus was chained to the rock it was not an eagle that plucked at his vitals, it was a vulture."

And so when Lamar delivered his eulogy of Charles Sumner the nation was electrified, for all men knew that his were no idle words of a sycophant but the magnanimous outpouring of a courageous heart. Probably no single speech in all our history had a more instantaneous effect or a greater influence. Certainly nothing in the decade following Appomattox was more persuasive in convincing the sections they should "clasp hands across the bloody chasm."

The Southern orators of the next generation, led by Henry W. Grady,[6] convinced their countrymen that the legend of the phoenix could come true. It has. To them we owe much.

The "New South" found its major prophet in Woodrow Wilson. "The South is of the Woodrow Wilson way of thought. He phrased with beauty and with power, the deepest convictions of his own people." (page 61)[7]

It is perhaps just as well that Dr. Gaines does not bring his categories of Southern orators down to the present time, for he would have had to award the palm to another Southerner living in the North. That might have been embarrassing, for John W. Davis is his Senior Trustee.

Dr. Gaines' selections are well chosen and adequate to illustrate his theme. Except for limitations of lecture time he would no doubt have amplified them. Probably he would have liked to have told us more about "Private" John Allen of Mississippi, the first Southerner who dared joke about the Confederate War, the most delightful humorist who ever entertained the House of Representatives.[8]

If these lectures are ever expanded, as they should be, into a definitive study of the subject, there will be space for the inclusion of other names. Edward W. Carmack, Pat Harrison and Thad Carraway had some of the corrosive wit of John Randolph of Roanoke without his theatricality or misanthropy.

Bob Taylor, a prose poet and a prince of entertainers, will be included. Perhaps there will be a chapter on what Tennesseans remember as the "War of the Roses", when the brothers Taylor, Democratic Bob and Republican Alf, campaigned against one another for the governorship, lustily lambasting one another in joint debate by day and sleeping together in fraternal concord by night.[9]

In the larger work John Sharp Williams will not be omitted, for next to the President he was the most notable orator of the Wilson era. His natural spontaneity, the purity of his English, his good taste, his learning and logic, his mastery of the philippic, and his restrained

5. Dr. Gaines correctly points out that both Henry's native capacity and his preparation have been minimized.

6. "As the century turned, Grady's 'New South' had displaced Patrick Henry's 'Give me liberty' as the favorite declamatory vehicle of the boys of Dixie." (page 57)

7. Woodrow Wilson, notwithstanding his long residence in the North, was essentially a Southerner. Speaking at the University of North Carolina he declared: "The only place in the country, the only place in the world, where nothing has to be explained to me is the South."

8. Among the legends of the American Bar Association are the stories of the doings and sayings of Private John and his crony, George W. Peck of Chicago, at the Annual Meetings.

9. Bob won on this occasion and afterward went to the United States Senate. Many years later Alf was elected governor.

Bob Taylor had a good, though somewhat ornate, prose style and reveled in rhythmic sentences. He also possessed a keen sense of humor. For long it had been the invariable practice of Tennesseans speaking in Texas to stress the contributions Tennessee had made to the Lone Star State, naming Sam Houston, Davy Crockett, et al. Governor Taylor (as he then was), speaking on Tennessee Day at the Dallas Exposition in 1890, varied the theme:

"The greatest grievance which we have against Texas lies in the fact that we have loaned her thousands of our bravest men and loveliest women and she has never returned our jewels except upon the requisition of the Governor, when Tennessee has tenderly sung to Texas "Oh, where is my wandering boy tonight?"

emotion, perfectly equipped him for every occasion. Two competent judges, with different viewpoints, James M. Cox[10] and George Wharton Pepper[11], have pronounced him the greatest orator they ever heard in Congress. In a popular election, without descending to demagogy, he proved himself superior to James K. Vardaman in appealing to the voters of Mississippi although Vardaman was popularly supposed to be an adept in every artifice calculated to sway that particular electorate.

The most effective occasional address I ever heard was delivered by Williams. Shortly after I came to the Bar, former Senator Edward W. Carmack was killed on a Nashville street by his political enemies. A few weeks later Williams spoke in Memphis at a meeting held to honor Carmack, who had once lived in that city and had many personal and political friends there. Memphis was the home of the Governor of the State, Malcolm R. Patterson, who had been Carmack's bitterest opponent, and whose partisans at least equalled in number the friends of Carmack.

The theatre was packed that Sunday afternoon; the two factions were about equally represented in the audience. Feeling was tense. All faces were serious and some were scowling. Not a few men were armed.

Senator Williams spoke without either manuscript or notes. He began in a conversational tone which gradually increased in volume without any apparent lifting of the voice. Without fulsomeness but in moving phrases he sadly described the friend he had known and loved. The effect was achieved by the accuracy and vividness of the description, by the beauty and appropriateness of the language and by the strength of the speaker's suppressed feeling.

And then as if unable longer fully to control himself, his eyes flashing, but without either shouting or gesticulating, he launched into a withering denunciation of Carmack's enemies and especially of his assailants.

Finally, the climax reached, after a pause he walked quietly to the very edge of the stage and, standing silent for a moment, in a voice vibrant with deep emotion, quoted without identification those lines from "Macbeth":

> His virtues
> Will plead like angels, trumpet-tongued, against
> The deep damnation of his taking off.

As he stepped slowly back there was a hush, the still before the storm; and then every listener leaped to his feet and there broke the thunder of unanimous applause.

WALTER P. ARMSTRONG
Memphis, Tennessee

THE CONSTITUTION AND WHAT IT MEANS TODAY. *By Edward S. Corwin. (Ninth Edition, Completely Revised). Princeton, N. J.: Princeton University Press. February 3, 1947. $2.75. Pages xvi, 271.*

Ordinarily this department does not note, much less review, successive editions of a book in the field of legal literature. Exception is made when, as in this instance, the issuance of a completely revised edition of a well-known volume is in itself a milestone or landmark along the troubled road of American constitutional history.

When Professor Corwin of Princeton University first published, in 1920, his interpretation of the Constitution, it became one of the most controversial works of non-fiction. Many of the trends which he saw in progress were assailed and denied, by staunch defenders of the Constitution as it was conceived and written. With the years, the successive editions, the shifts of judicial decision, and the rapid course of economic and political events, Professor Corwin's work has grown in stature and recognition, and is now looked on by many as having been regrettably prophetic. Within less than twenty years, troubling things have come to pass.

The ninth edition has about twice as many pages as the first, and about four times as many words of commentary. Neither cases nor other authorities were then cited; there was no table of cases nor indices. These indispensables have been added. The plan of giving the current interpretation of the Constitution, article by article and clause by clause, has been retained. The style is attractive for laymen as well as sufficiently exact for lawyers, and the result is a volume which will be read avidly by those who wish to get an over-all picture as to what an observant legal scholar believes has befallen the Constitution. No better means of admeasuring the many changes can be found within as brief a compass. The analysis is penetrating and useful for readers of all vocations and interests; some lawyers will try not to agree with parts of it.

The present emphasis is on the past decade and especially the most recent years. Professor Corwin maintains his thesis that during the past decade, "the Constitution has been subjected to the impact of two major crises." The first of these, as he sees it, is "the necessity which confronted it in 1937 of affording the New Deal lodgment within the constitutional fold." As he pointed out in his seventh edition, "the official guardians of the fundamental law met this necessity by returning to Chief Justice Marshall's sweeping conception of National supremacy, thereby discarding the century-old theory that the reserved powers of the States comprised an independent limitation on National power." This is of course the concept against which Judge Julian P. Alexander, of the Supreme Court of Mississippi, inveighed so earnestly in our January issue (pages 3-6, 78-81).

Professor Corwin's present revisions reflect largely what he sees as the second great constitutional crisis of the decade, due to American participation in World War II and the events leading up to it. In wartime, he points out, "Interpretation of the Constitution falls much more largely to the political branches of the government than to the judiciary." In his eighth edition, accordingly, considerable attention was given to Executive

10. *Journey Through My Years*, page 102.

11. "No member of the Senate in my time approached in eloquence John Sharp Williams of Mississippi." *Philadelphia Lawyer*, page 148.

and legislative acts illustrative of the war power and suggestive of its effect both on private rights and constitutional structure. At the same time several other topics which recent events had brought into prominence were accorded greater space than hitherto, such as Nationality, Conscription, Executive Agreements, and so on. The present edition takes note of several previously neglected topics, and brings the whole story down substantially to January 1 of this year.

The learned author reminds that at the close of his preface to the seventh edition he wrote: "Constitutional law has always a central interest to guard. Today it appears to be that of organized labor". Professor Corwin notes that "This was said apropos of the Court's virtual repeal of the Sherman Act so far as the activities of labor unions are concerned and of its bringing picketing under the rubric 'liberty'." Pursuing this same course of decision further, the Court has today, as he sees it, "replaced the older doctrine of *laissez faire* of which business management was the beneficiary with one equally challenging to public authority, of which organized labor and its leadership are the beneficiaries. From this circumstance and the public reaction to it are likely to arise the most interesting problems of constitutional interpretation for some time to come".

In a concluding paragraph which looks ahead, Professor Corwin recalls to mind Mr. Justice Holmes' remark respecting the Supreme Court: "We are very quiet there, but it is the quiet of a storm center, as we all know." Professor Corwin observes that "In order to remain at the center of a storm, one has to move along with it; and this is just what the Court failed to do prior to 1937, with the result finally of getting caught in the tempest's swirling periphery, thereby losing a few feathers." He suggests that since 1937 the Court "has been doing the exact opposite of this, but the penalty invited is the same. It is altogether probable that the Court is in for some rough weather in the near future, not all of which will have been bred outside its own walls."

INDUSTRIAL PEACE AND THE WAGNER ACT. *How the Act Works and What to Do About It. By Theodore R. Iserman. With a Foreword by Professor Leo Wolman. New York: McGraw-Hill Book Company, January, 1947. $1.50 (paperbound). Pages 91.*

One of the most competent and polemic of the many current brochures on acutely controversial subjects has been written by a militant member of the New York Bar, whose discussion of rank-and-file union control over the supervisory forces depended on by industrial management will be well remembered by our readers (December issue, pages 875-879).

The author gives a concise and cogent presentation of what he regards as basic faults in the Wagner Act, from which "monopoly" powers of irresponsible labor leaders seem to him to have stemmed. His exposition reflects the temper of the times, particularly of those who for years have been "out in front" in what was long a losing battle against the abuses that grew up from the administration of the Act. Mr. Iserman's narration carries the battle-scars of his own vain struggles. And the incisive "foreword" is by the scholarly Professor Leo Wolman, of Columbia, who has spent a lifetime in loyalty to the cause of labor organization but was assailed as a "traitor" when his sense of reality told him that the long-run public interest needed protection from abuses and arbitrary powers.

A lawyer who wished to make an effective advocacy of amendments of the Wagner Act would find Mr. Iserman's book an excellent outline of argument. By no means all who are aware of abuses will go along with all of his proposals for modifications. In the opinion of many objective observers, a NLRB climate of impartiality and fairness in fact-finding, and of active regard for the public interest as well as for labor leaders' quests for power, might have remedied, and might still remedy, many abuses which Mr. Iserman attributes to the Act itself. A pattern of one-sided adherence to formulated concepts having been established by the NLRB and long persisted in, great difficulty is experienced, by Mr. Iserman as by leaders in the Congress, in drawing the line between abuses which require corrective modifications of the Act and those which could be overcome by a restatement of the legislative purpose and the setting up of an impartial, law-governed agency for its enforcement against labor organizations and employers alike in the interests of fair play for paramount public rights.

Inter-American Bar Postpones Meeting

The fifth Conference of the Inter-American Bar Association, scheduled to be held in Lima, Peru on April 6-18 will not take place at that time. The Lima Organizing Committee in charge of arrangements has found that hotel accommodations will not be available for the large number of delegates who may wish to attend.

14

Review of Recent Supreme Court Decisions

by **Edgar Bronson Tolman***

Fair Labor Standards Act—"Portal-to-Portal" Pay—Periods Between Punching Clock and Beginning and End of Productive Work as Part of Statutory Workweek—Burden of Proof

Anderson v. *Mt. Clemens Pottery Company,* 91 L. ed. Adv. Ops. 1114; 66 Sup. Ct. Rep. 1187; U. S. Law Week 4434. (No. 342, decided June 10, 1946).

Note. Publication of the review of this opinion, written soon after its delivery, was inadvertently omitted. Because this case has been referred to as the basis of the so-called "portal to portal" suits, this review is here inserted. E. B. T.

Employees of the pottery company brought this suit under § 16 (b) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 201 et seq.) for overtime compensation based upon the periods between the time of punching the time clock and the time when productive labor was scheduled to start and finish. A special master recommended dismissal for failure to sustain the burden of proof. The District Court allowed recovery for a period estimated to be consumed in punching the clock and walking between the clock and the place of work (60 F. Supp. 146). Only the company appealed. The Sixth Circuit Court of Appeals held the master's findings sustained and dismissed the cause of action (149 F. 2d 461). The Supreme Court reversed and remanded the case for the determination of the amounts of walking time involved and preliminary activities involved and the assessment of damages with due regard to the *de minimis* principle.

Mr. Justice MURPHY delivered the opinion of the Court. He states that an employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference; that the burden then shifts and, if the employer fails to produce evidence of the precise amount of work or which is sufficient to negative the reasonableness of the inference, the court may approximate the damages in an award. He agrees with the special master that there was insufficient proof that productive work was done outside the scheduled periods or that the times of clock-punching measured the employees' work or that employees were forced to wait for times before and after the scheduled periods or were not free to spend such times on their own behalf but states that there must be included in the statutory workweek the walking time and time involved in preliminary activities such as preparing equipment for productive work.

Mr. Justice BURTON, with whom Mr. Justice FRANKFURTER concurred, rendered a dissenting opinion for affirmance of the dismissal.

Mr. Justice JACKSON did not participate.

The case was argued by Mr. Edward Lamb for Anderson, and by Mr. Frank E. Cooper and Mr. Bert V. Nunneley for Mt. Clemens Pottery Company.

Federal Procedure—Rules 30 (b), 33, 34 and 26—Discovery of Contents of Lawyers' Files

Hickman v. *Taylor,* 91 L. ed. Adv. Ops. 330; 67 Sup. Ct. Rep. 385; U. S. Law Week 4139. (No. 47, decided January 13, 1947).

The Federal Rules of Civil Procedure greatly broadened the field of discovery. So broad was the new field that from the very beginning it became evident, to those who were framing the rules, that means must be provided for the protection of litigants from abuse.

For the purpose of providing that protection, Rule 30 (b), was incorporated into the Rules. That Rule may be here briefly restated as follows:

> . . . the court in which the action is pending may make an order that . . . certain matters may not be inquired into . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.

This case was brought to recover damages because of the death of one of those employed on a tug which suddenly sank in the Delaware river while towing a car float of the B. & O. R.R. Plaintiff's attorney sought, as a matter of right, discovery of oral and written statements of witnesses, in the possession of defendants' attorneys.

The district judge ordered the attorney to produce all written statements of witnesses and to state in

* Assisted by James L. Homire; labor cases by E. J. Dimock, member of the Board of Editors; tax cases by Mark H. Johnson.

substance any fact learned through oral statements of witnesses to him, —the attorney refused compliance with this order. He was adjudged in contempt and ordered committed to jail until he should comply. On appeal to the Circuit Court of Appeals, Third Circuit, the judgment of the district court was reversed, that court holding that the information here sought was part of the "work product of the lawyer" and hence privileged from discovery under the Federal Rules of Civil Procedure. The Supreme Court took the case on certiorari and affirmed the judgment of the Circuit Court.

Mr. Justice MURPHY delivered the opinion of the Court. He first examines the principal rules which he deemed applicable to this question. He declares that none of those rules authorize the production of the statements in the lawyers' files of what the witnesses have told the lawyer, and that "to the extent that petitioner was seeking the production of memoranda and statements gathered by Fortenbaugh [defendant's lawyer] in the course of his activities as counsel, petitioner misconstrues his remedy." He shows that the desired production of statements, written and oral, was not authorized by any of the discovery rules unless the lawyer's deposition was taken under Rule 26 and a *subpoena duces tecum* was served under Rule 45 for the production of specified documents at the taking of the lawyer's deposition.

Plaintiff's counsel had urged that to deny the individual plaintiff the discovery ordered by the trial court, would "give a corporate defendant a tremendous advantage in a suit by an individual plaintiff". In reply to that contention Mr. Justice MURPHY says "Discovery . . . is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."

It was argued on behalf of plaintiffs that the discovery rules are designed to enable the parties to discover the facts and compel their disclosure wherever they might be found.

In reply to this argument Mr. Justice MURPHY assents to the claim that discovery rules "are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation . . . The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled, . . . thus reducing the possibility of surprise."

Mr. Justice MURPHY points out the "ultimate and necessary boundaries" of discovery. He says: "As indicated in Rules 30 (b) and (d) and 31 (d) limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner, as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domain of privilege." Having thus summarized the limitations on the right of discovery, Mr. Justice MURPHY points out some of the permissible fields of discovery from the lawyer's files. He says: "Where relevant and non-privileged facts remain hidden in an attorney's files and where production of those facts is essential to the preparation of one's case, discovery may be properly had."

Defendants' attorney invokes the protection of the "lawyer-client privilege" under Rule 30 (b). As to that point Mr. Justice MURPHY declines to describe the bounds of this privilege, but says that it does not apply to "information which an attorney procures from a witness while acting for his client in anticipation of litigation."

It is next pointed out that there was no showing made "of necessity" or that denial of production would cause the plaintiff any undue hardship or injustice.

The necessity that much of the lawyers' work must be "done in secrecy" is adverted to.

The opinion concludes with a denial that "all the files and mental processes of lawyers" were by the discovery rule "opened to the free scrutiny of their adversaries."

Mr. Justice JACKSON delivered a concurring opinion in which Mr. Justice FRANKFURTER joined. He goes back to the origin of discovery as a judicial tool. He traces it to the old Equity Rules and follows it into its modern development. He declares that such a use of discovery as is here sought, finds no approval in the history of discovery.

Moreover he declares that such an interpretation of the Federal Rules would soon make them inoperative for the Bar would quickly refrain from accumulating in their files any such material. Finally he turns to an examination of the evil consequence to the reputation of the Bar and the lowering of public confidence in lawyers which would follow such a lowering of professional ethics.

Mr. Justice JACKSON's concurring opinion closes with this paragraph: "The question remains as to signed statements or those written by witnesses . . . such a statement might be useful for the impeachment of the witness who signed it, if he is called and if he departs from the statement."

The case was argued by Mr. Abraham E. Freedman for Hickman, Administrator, and by Mr. Samuel B. Fortenbaugh, Jr. and William I Radnar for the tug-owners.

Eminent Domain—Just Compensation—Declaration of Taking Act—Interest

Albrecht et al. v. *U. S.*, 91 L. ed. Adv. Ops. 461; 67 Sup. Ct. Rep. 606; U. S. Law Week 4200 (Nos. 148, 149, 150, 151, and 155, decided February 3, 1947).

The Government entered into separate written contracts with five landowners for the purchase of their

lands at agreed prices. It was agreed that in case of failure to show title satisfactory to the Attorney General, the Government should condemn the land and take title and possession under the "Declaration of Taking Act". The contract made no mention of interest.

The Government took possession of the lands under the contract but thereafter its representatives became convinced that by reason of fraud and other things the price was "grossly excessive", took steps to rescind the contracts, filed condemnation actions, took immediate possession by order of court, and deposited in the court sums of money substantially less than the contract price. In a companion case, involving an identical contract a district court held the contract valid. That judgment was affirmed by the Supreme Court, whereupon the Government paid into the Court in the present cases the balance of the contract price. The landowners asserted their rights to interest on the value of the land, under the Fifth Amendment.

On this controversy one district court held for the Government and another district court held that the landowners were entitled to interest. The Circuit Court (Eighth Circuit) held for the Government. In another case involving similar facts the Fifth Circuit Court held for the landowners.

On certiorari the Supreme Court affirmed the decision of the Circuit Court (Eighth Circuit) and denied the recovery of interest.

The opinion of the Court was delivered by Mr. Justice BLACK.

As to the claim that the owners were entitled under the Fifth Amendment to receive interest from the date of taking to the date of payment on the value of the land taken, Mr. Justice BLACK says: ". . . the methods used by courts to determine 'just compensation' in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question. The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. Nor does it bar them from embodying that agreement in a contract, as was done here."

Mr. Justice BLACK recognized that when the taking was in the exercise of the right of eminent domain, as distinguished from acquirement by contract, interest is considered by the Court in estimating just compensation, but says that where, as in the instant case, the compensation was fixed by contract, in the absence of express contract or legislative provision, interest cannot be added to the agreed price.

Mr. Justice REED and Mr. Justice DOUGLAS dissented. They quote from the opinion of the Circuit Court of Appeals (Fifth Circuit) the following statement: " 'The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory'. *United States* v. *Baugh,* 149 F. 2d 190, 192. The landowners' 'right to have interest is found in the Constitution and is neither found nor lost in the contract.' Id., page 193."

In support of that position they emphasize the fact that the Government "renounced" the contract and proceeded to acquire the land by condemnation rather than by contract.

The case was argued by Mr. Richmond C. Coburn and Mr. Samuel M. Watson for Albrecht and by Mr. Roger P. Marquis for the Government.

Double Jeopardy—Due Process—Cruel and Unusual Punishment

Louisiana ex rel Willie Francis v. *Resweber, Sheriff,* 91 L. ed. Adv. Ops. 359; 67 Sup. Ct. Rep. 374; U. S. Law Week 4153. (No. 142, decided January, 13, 1947).

Francis was convicted of murder and sentenced to be electrocuted May 3, 1946. On that day he was prepared for execution, strapped in the chair and the executioner threw the switch which should have caused a fatal charge of electricity to have passed through his body. The mechanism failed to operate. After three hours of effort it still failed to work. There was doubt and controversy as to whether any electricity passed through the prisoner's body. He was taken back to his cell. The Governor of Louisiana fixed a new date, May 9, for the execution. Applications were made to the State Supreme Court for writs of certiorari, mandamus, prohibition and habeas corpus. That court denied the petitions on the ground of lack of any basis for judicial review. The Supreme Court of the United States granted certiorari, because of alleged violations of right under the Federal Constitution. The decision of the Supreme Court of Louisiana was affirmed. Mr. Justice REED announced the judgment of the Court.

The opinion began with a statement that in the consideration of the case under its peculiar circumstances it would be assumed but not decided that violation of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment would be violative of the Due Process Clause of the Fourteenth Amendment. Opening this branch of the case, Mr. Justice REED says, "We see no difference from a constitutional point of view between a new trial for error of law at the instance of the state, that results in a death sentence instead of imprisonment for life, and an execution that follows a failure of equipment."

In regard to the Eighth Amendment the evidence and arguments are reviewed and Mr. Justice REED says, "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Next is considered the argument that the treatment of the prisoner,

under the circumstances here shown, was a violation of the equal protection of the law. That contention was rejected and it was said, "So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would be generally applied."

Mr. Justice FRANKFURTER delivered a concurring opinion. He emphasizes two points: One that "the notion that the Privileges or Immunities Clause of the Fourteenth Amendment absorbed . . . the provisions of the Bill of Rights that limit the Federal Government has never been given countenance by this Court;" and, two, that Louisiana has the responsibility and the resulting right to decide the extent to which she may go in enforcing her own law when the method employed is not "repugnant to the conscience of mankind."

Mr. Justice BURTON delivered a dissenting opinion in which Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE concurred.

It was urged that because of the unusual circumstances of this case the Supreme Court of Louisiana should decide certain "issues of fact not heretofore adjudicated." The first of these was, the extent to which, if any, electric current was applied to and passed through the prisoner's body. The reason assigned for this insistence was that the substitution of electrocution for hanging was intended to make the death penalty as painless as possible and that the new method, which called for a continuous current of electricity through the body of the condemned until death ensued must be strictly complied with. It was insisted that "there can be no implied provision for a second, third, or multiple application of the current". Attention was called to the fact that the petition alleged that a current of electricity passed through the prisoner's body and that although the answer denied that allegation, the Louisiana court declined to receive evidence and decide that issue. It was emphasized that the dissenting justices, in calling for a remand of the case to the Supreme Court of Louisiana were not asking for the release of the prisoner from punishment, but only for the complete determination of all the issues raised on his behalf.

The case was argued by Mr. James Skelly Wright for Francis and by Mr. Michael E. Culligan and Mr. L. O. Pecot for State of Louisiana.

Patents — License Agreements — Price-Fixing Clause Is Inseparable from Royalty Clause—In Action to Recover Royalties Licensee Is not Estopped to Defend on Ground That the Licensed Patent is Invalid and Entire Agreement Illegal and Unenforceable

Edward Katzinger Co. v. *Chicago Metallic Mfg. Co.*, 91 L. ed. Adv. Ops. 319; 67 Sup. Ct. Rep. 416; U. S. Law Week 4126. (Nos. 70 and 71, decided January 6, 1947).

The Katzinger Company licensed the Chicago Company to manufacture and sell baking pans under Jackson patent No. 2,077,757, in return for a stipulated royalty. The agreement included a provision reserving to the licensor the right to establish minimum selling prices for the patented pans sold by the licensee, and a further provision that if the licensee elected to terminate the contract without ceasing to manufacture the pans, the licensee should be estopped to deny the validity of the patent.

The licensee operated under the license for a time, maintaining the prices established by Katzinger, but subsequently a dispute arose as to whether certain pans sold by the licensee were covered by the patent. Declining to pay royalties on the pans in question, the licensee gave notice of termination, and brought suit for a declaratory judgment holding the patent invalid and not infringed. The licensor counterclaimed for an accounting, alleging that the licensee was estopped to question the validity of the patent. The District Court found for the licensor, Katzinger, holding that Chicago was estopped to attack the validity of the patent, and ordered an accounting.

The Circuit Court of Appeals reversed on the authority of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, holding that the price-maintenance provision was inseparable from the royalty clause; that if the patent was invalid the contract was illegal and unenforceable; and that the District Court had erred in holding Chicago to be estopped to challenge the validity of the patent as a means to establish the illegality and unenforceability of the contract. The cause was remanded to the District Court to pass upon validity. That Court found the patent invalid and rendered judgment for Chicago. The Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari because of a conflicting decision in *MacGregor* v. *Westinghouse*, 350 Pa. 333.

The opinion of the Court was delivered by Mr. Justice BLACK. The Court passed over the question of whether the price-fixing agreement would be lawful if the patent were valid, holding that the present case is controlled by the *Sola* decision. It was held that while in the *Sola* case the plaintiff had sought an injunction to compel observance of all provisions of the contract, including price maintenance, that decision was not limited to a case in which enforcement of a price maintenance clause was sought but "instead of resting on such a narrow procedural base, was firmly grounded upon the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents".

The Court found that the licensee's obligation to pay royalties and its agreement to maintain prices "constituted an integrated consideration for the license grant. Consequently, when one part of the consideration is unenforceable because in violation of law, its integrated companion must go with it."

The opinion further states that, "Moreover, solicitude for the interest of the public fostered by freedom from invalid patents and from

restraints of trade, which has been manifest by the line of decisions of which the *Scott Paper Co.* [326 U. S. 249] and *Sola* cases are two of the latest examples, requires that there should be no departure from the guiding principles they announced."

Accordingly, the decision of the Circuit Court of Appeals was affirmed.

In a dissenting opinion, Mr. Justice FRANKFURTER, with whom Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice BURTON concurred, expressed the view that the issues were not controlled by the *Sola* decision, and that it is at least doubtful whether the effect of the instant decision is not to destroy the long established doctrine of licensee estoppel. The dissent concludes, "If a doctrine that was vital law for more than ninety years will be found to have now been deprived of life, we ought at least to give it decent public burial."

The case was argued by Mr. Charles J. Merriam for Katzinger and Mr. Ephriam Banning for Chicago Metallic Co.

Administrative Procedure — Agricultural Marketing Act of 1937 — Recovery of Payments for Producer — Settlement Fund — Pursuit of Administrative Remedy

United States v. *Ruzicka*, 91 L. ed. Adv. Ops. 229; 67 Sup. Ct. Rep. 207; U. S. Law Week 4088 (No. 54, decided December 17, 1946).

Ruzicka, and others, handlers of milk, resisted an action brought to recover amounts claimed to be due from them on account of adjustments made in respect of payments to them for milk. The question arises in connection with the administration of the Agricultural Marketing Act of 1937 under which Order No. 41 was issued by the Secretary of Agriculture. This order is an "Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area." Under it handlers are paid a uniform minimum price, which is subject to adjustment.

In the action brought here to recover against the handlers on account of adjustments under which they were required to make payments into the Producer-settlement Fund, they defended on the ground that the demand on them was based on faulty inspection of their accounts and improper tests of their milk and milk products. The District Court ruled that these issues could not be raised in the court, because the handlers had not invoked the administrative remedy provided by the Act. This the Circuit Court of Appeals reversed. On certiorari the Circuit Court's judgment was reversed by the Supreme Court.

Mr. Justice FRANKFURTER delivered the opinion of the Court. He cites the relevant provisions of the Act and describes the scheme set up under the Act and under Order No. 41. While recognizing that the Act does not expressly preclude a handler from raising in court defenses of the character here involved, the opinion concludes that nevertheless that limitation is implicit in the statutory scheme.

Mr. Justice DOUGLAS concurred in the result.

The case was argued by Mr. George Thomas Washington for the Government and by Mr. William Parker Ward for Ruzicka.

Administrative Procedure — Interstate Commerce Act — Water Carriers — Certificate of Convenience and Necessity — Not Subject to Alteration by Commission

United States, et al. v. *Seatrain Lines, Inc.*, 91 L. ed. Adv. Ops. 311; 67 Sup. Ct. Rep. 435; U. S. Law Week 4132 (No. 61, decided January 6, 1946).

This case involves the question whether the Interstate Commerce Commission having granted a certificate of public convenience and necessity under Section 309 (a) of the Interstate Commerce Act to a common carrier by water, to carry "commodities generally" may thereafter modify the certificate by restricting it to car-ferry operations for transporting loaded and unloaded freight cars. The Commission on its own motion reopened the proceedings in question and modified the certificate in such manner as to impose the restriction above mentioned. The District Court set aside the order on two grounds: First, that the Commission exceeded its statutory authority; and, second, that in any event it had wrongly modified the certificate in view of the fact that the carrier had expended large sums of money in reliance upon the complete validity of the original certificate. On appeal to the Supreme Court the ruling of the District Court was affirmed, but the action of the Supreme Court is limited to approval of the first ground advanced by the District Court.

The opinion of the Court was delivered by Mr. Justice BLACK.

Mr. Justice RUTLEDGE concurred in the result.

The case was argued by Mr. Edward M. Reidy for United States and by Mr. Wilbur LaRoe, Jr., for Seatrain Lines.

Taxation — Constitutionality of Gross Receipts Tax Upon Interstate Sale

Freeman v. *Hewit*, 91 L. ed. Adv. Ops. 205; 67 Sup. Ct. Rep. 274; U. S. Law Week, 4077. (No. 3, December 16, 1946).

The taxpayer was the testamentary trustee, domiciled in Indiana, of a decedent domiciled in Indiana at the time of his death. The trustee instructed his Indiana broker to sell securities forming part of the trust estate. Through the broker's New York correspondents the securities were offered for sale on the New York Stock Exchange. When a purchaser was found the New York brokers notified the Indiana broker who in turn informed the trustee, and the latter brought the securities to his broker for mailing to New York. Upon their delivery to the purchasers, the New York brokers received the purchase price, which, after deducting expenses and commission, they transmitted to the Indiana broker. The latter delivered

the proceeds less his commission to the trustee. Indiana imposed a 1% tax upon the gross receipts of the sales. The tax was sustained by the Supreme Court of Indiana.

The decision was reversed, in an opinion by Mr. Justice FRANKFURTER, on the ground that the tax was "a levy upon the very process of commerce across States lines", and was therefore a violation of the Commerce Clause.

The opinion states that mere absence of discrimination does not validate a tax upon interstate commerce. "This limitation on state power does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

Mr. Justice FRANKFURTER points out also that direct taxation of interstate commerce is inherently more burdensome than the police power regulation of such commerce. "The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce."

It is noted that taxation is not forbidden merely because it has some effect upon interstate commerce. Examples of permissible taxation, to make such commerce "pay its way", are a tax on local manufacture, even if the products are destined for other States; a license tax on foreign and domestic corporations doing business in the State; a privilege tax on residence, measured by net income, including that derived from interstate commerce; and a property tax in the state of domicile of the owner. "While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

The opinion rejects the test of multiple taxation. "If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated."

Mr. Justice RUTLEDGE, in a lengthy concurring opinion, states that the defect of the tax is that it is unapportioned, and not that it has a "direct incidence" upon interstate commerce.

In a dissenting opinion in which Mr. Justice MURPHY concurred, Mr. Justice DOUGLAS argued that the receipt by the trustee of the proceeds of sale was not interstate commerce, and that a tax upon such receipt was not a violation of the Commerce Clause.

The case was argued by Mr. Harry T. Ice for Freeman; by Mr. John J. McShane for Hewitt.

Railroad Reorganization — Jurisdiction of Bankruptcy Court to Determine Claims for State Taxes

Gardner v. *New Jersey*, 91 L. ed. Adv. Ops. 410; 67 Sup. Ct. Rep. 467; U. S. Law Week 4171 (No. 92, decided January 20, 1947).

In proceedings for reorganization of the Central Railroad of New Jersey, under § 77 of the Bankruptcy Act, the State of New Jersey filed in the bankruptcy court its claim for taxes. These had been the subject of prior proceedings of both legislative and judicial nature, the state court having declared unconstitutional certain legislation providing for compromise and settlement of the delinquent taxes.

The bankruptcy court referred the tax claim to a special master who found among other things that § 77 confers jurisdiction on the bankruptcy court to determine the claim of the state against the railroad and the amount of the taxes due and their lien, subject to the limitations of *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132.

The bankruptcy court confirmed the report of the special master, but the Circuit Court of Appeals reversed. It held that the only matters left open in the bankruptcy court were mathematical errors of computation or legal error in assessment.

On certiorari the Supreme Court reversed. Mr. Justice DOUGLAS delivered the opinion of the Court, which rejects the argument that to permit the bankruptcy court to determine the tax claim constitutes a suit against a state. In this connection the broad definitions of "claims" and "creditors", as contained in § 77, are emphasized.

The Court also rejects the contention that Congress did not include state tax liens in the scheme of § 77 proceedings.

The Court, however, reaffirms the rule of *Arkansas Corporation Commission* v. *Thompson, supra*, that the bankruptcy court may not redetermine property values of the road, where state valuation proceedings have already been had. But that, nevertheless, leaves open many questions for trial by the reorganization court. The opinion cites examples of questions thus left open, including the validity and priority of lien, its extent whether covering realty, personalty, or revenues, the amount of the tax claim and whether it has been swollen by forbidden penalties.

The Court also alludes to the useful function of compromises in reorganization proceedings, but declines to pass on the merits of the controversy here as to the legislative compromise of the tax claims, because this question has not been passed on by either the bankruptcy court or the Circuit Court of Appeals.

The case was argued by Mr. James D. Carpenter for the bankruptcy trustee and by Mr. Benjamin C. Van Tine for New Jersey.

Lawyers *in the News*

Richard Smith WHALEY

■ When a vacancy in the office of Judge of the Court of Claims arose in 1930, President Herbert Hoover appointed to the post a seasoned South Carolina lawyer who had shown an independence and firmness in dealing fairly with issues between claimants and the Government. A native of Charleston, South Carolina, educated at the University of Virginia from which he took his degree in law, WHALEY had served eleven years in the State Legislature, of which he had been the Speaker, and eight years in the National House of Representatives. He had been somewhat active as a Democrat in National politics, a delegate to National conventions of his party, and a vigorous supporter of Woodrow Wilson for and in the Presidency.

After he left Congress in 1921, President Calvin Coolidge in 1923 appointed him as Chairman of the District of Columbia Rent Commission. WHALEY showed diligence and an aptitude for judicial work which led President Coolidge to appoint this South Carolinian a Commissioner of the Court of Claims in 1925, to cope with the flood of accumulating claims from World War I. When an appointment to the Court of Claims was needed in 1930, President Hoover disregarded partisan considerations by naming WHALEY to the Court. He became Chief Justice in 1939.

On February 1 Chief Justice WHALEY resigned from the Court, at the age of 72 years, having made an enviable record in the discharge of his duties in what has become one of the most important and influential federal judicial tribunals, now likely to be confronted with a deluge of claims from World War II.

Marvin JONES

■ When a vacancy in the office of Chief Justice of the Court of Claims arose in January by reason of the resignation of the distinguished South Carolina Democrat whom President Hoover had put on the Court, President Truman named as his successor Judge MARVIN JONES, of Texas, who had been named to the Court in 1940 but had left it for two years on leave of absence for administrative work during 1943-45. Judge Benjamin H. Littleton, of Texas, whom President Hoover had named to the Court in 1929, was not advanced to the Chief Justiceship.

JONES was born near Valley View, in Cooke County, Texas. In 1907 he was graduated in law from the University of Texas and admitted to the Texas Bar, to practise at Amarillo. During World War I he was in the Tank Corps. He was a member of Congress during 1917-40, and was Chairman of the House Committee on Agriculture and member of the Democratic National Campaign Committee.

Appointed to the Court in 1940, he obtained a leave of absence in 1943 to act as Assistant Director of Economic Stabilization. He was President of The United Nations Conference on Food and Agriculture, at Hot Springs, Virginia, in 1943, and was the head of the Federal War Food Administration from June of 1943 until his return to the Court in July of 1945. JONES' successor as a member of the Court of Claims has not been nominated at this writing. Lawyers who believe that partisan considerations should not control the nomination or confirmation of judges are drawing comparisons between what transpired in 1930 and what has taken place thus far in 1947.

Philip B. PERLMAN

■ What has been generally commented on as placing a capable, "middle-of-the-road" lawyer in a "key" post, was President Truman's nomination of PHILIP B. PERLMAN, of Baltimore, Maryland, as Solicitor-General of the United States, to succeed J. Howard McGrath, who was elected last fall to the Senate from Rhode Island.

PERLMAN, who was 57 years old on March 5, studied law at the University of Maryland, but turned to journalism and was employed on Baltimore newspapers. He was admitted to the Bar of his State in 1911 and began the practice of law. He was graduated from the University of Maryland in law in 1912, but stayed on in journalism. He was City Editor of the Baltimore *Evening Sun*, and a very good one, when he

resigned in 1917 to become a legal assistant to Albert C. Ritchie, then Attorney General of the State. In his earliest days at the Bar, Ritchie had been an assistant secretary of our Association, in which he never lessened his active interest. When Ritchie moved up to the Governorship and became a National figure because of his independence and his devotion to a republican form of government under the Constitution, PERLMAN became Secretary of State.

From 1920 to 1923, he was a partner in the law firm of Marbury and Perlman, of which his partner, Ogle Marbury, is now the Chief Judge of the Court of Appeals of Maryland. PERLMAN'S experience in the argument of cases on appeal and in the drafting of constructive legislation has been unusually extensive. From 1923 to 1926, he was City Solicitor of Baltimore, and then resumed the general practice of law, in which he has been successful. In 1932 and 1940 he was a Maryland delegate to the Democratic National convention. In the Maryland Bar Association he is the Chairman of its important Committee on Laws. He has been a member of our Association since 1919, and was a member of the Association's Committee of seven members, which, during 1945-46, advocated effectively the legislation passed by the Congress to increase the salaries of federal judges. His qualifications in experience, temperament, forensic skill, and devotion to the spirit of American institutions, are attested by his friends. His name was presented to President Truman by Governor Preston Lane, for law groups in Maryland.

Eugene Donald MILLIKIN

■ A Colorado lawyer, member of our Association since 1922, has risen to a post of great influence and continual prominence, as Chairman of the Republican Conference in the Senate of the United States, under the Legislative Reorganization Act of 1946. On many questions of foreign and domestic policy, including the controversial reciprocal trade agreements, he has worked closely with Senator Vandenberg and others in trying to work out an acceptable bi-partisan policy, despite wide differences of view among members of his party, particularly in the House leadership.

MILLIKIN was born in Hamilton, Ohio, in 1891. His degree in law was earned at the University of Colorado in 1913. Admitted thereupon to the Bar of that State, he has practised law ever since in Denver. He enlisted in World War I as a private in the U. S. Army, was a Captain and then a Major in the infantry, and came out as a Lieutenant Colonel of Engineers. He received the Pershing citation for meritorious service.

He was appointed to the Senate to fill the unexpired term of the late Alva B. Adams. In 1944 he won reelection for a full term. He is a member of the Colorado and the Denver Bar Associations as well as our own Association. In the Senate he is showing an aptitude for policy-making, for reconciling dissident views, and for grasp of the details of legislation.

Robert Houghwout JACKSON

■ In a most friendly ceremony in his office in the Pentagon Building on February 7, the distinguished lawyer who was United States District Judge for the Southern District of New York and later a member of the Circuit Court of Appeals for the Second Circuit, now Secretary of War Robert P. Patterson, bestowed the Medal of Merit awarded by President Truman to the Jamestown (N. Y.) trial lawyer who had been the American Chief Counsel for the prosecution of Nazi war criminals before the International Military Tribunal at Nuremberg. The presentation was made in the presence of a large group of the staff who had been with him during the trials.

Born in 1892 in Spring Creek, Pennsylvania, a few miles south of the New York border, JACKSON was educated in the New York schools at Frewsburg and Jamestown and attended Albany Law School for awhile. His legal education was mostly in a busy law office; he was trying cases in the courts of justices of the peace before he was admitted to the Bar in 1913. Soon he was trial lawyer and counsel for many large business enterprises; then counsel for the Treasury in important prosecutions, including the claims against the late Andrew Mellon, in which he was opposed by the late Frank J. Hogan. Then this younger lawyer without a law school degree became Solicitor General, Attorney General; and an Associate Justice of the Supreme Court. Finally he was asked to doff his robe and leave his judicial duties to be Chief of Counsel for his country at Nuremberg.

The citation signed by the Chief Executive on December 18 and presented on February 7 read as follows:

> ROBERT HOUGHWOUT JACKSON, for exceptionally meritorious conduct in the performance of outstanding services to the United States from May, 1945 to October, 1946. Mr. Justice Jackson, as Chief of Counsel for the United States for the Prosecution of Axis Criminality, playing a leading role in the establishment of the Agreement signed in London on August 8, 1945, by the United States, Great Britain, France and the Union of Soviet Socialist Republics, and subsequently adhered to by nineteen other nations, which stands as a major contribution to the establishment of a peaceful world order, providing a basic charter which defines crimes against peace, war crimes and crimes against humanity, which recognizes the individual responsibility of persons who commit such crimes, and which provides a fair and acceptable procedure for trying individuals accused of such

crimes. Subsequently, at Nurnberg, Germany, his outstanding professional ability and tireless devotion to duty in directing the preparation and prosecution for the United States of the cases against Goering and other major Nazi war criminals and criminal organizations, his tact and diplomacy in achieving coordination of purpose and effort among the four allied powers joined in the prosecution, and his masterful skill in personally presenting before the International Military Tribunal the major arguments for the United States, constituted a most outstanding contribution to the success of these important trials. By these noteworthy achievements, Mr. Justice Jackson has made a contribution of singular importance to all peace-loving peoples of the World, thereby reflecting great credit upon himself and upon the United States.

Murray SEASONGOOD

■ A long-time member of the House of Delegates, a member of our Association since 1914, an indefatigable worker in many good causes in and outside the Association, will be a visiting Professor of Law at the Harvard Law School at its 1947 summer session.

This former Mayor of Cincinnati was born in that city in 1878. SEASONGOOD, who is practicing law as a member of the law firm of Paxton and Seasongood, has been closely associated with Harvard for many years. In 1933, he delivered the annual E. L. Godkin Lectures on Government. He has been a member of the Visiting Committees for the Graduate School of Public Administration and the Department of Government. He was graduated from Harvard College in 1900 and from the Harvard Law School in 1903.

Harold Montelle STEPHENS

■ A Utah lawyer who has served with distinction in many posts in his State and the Nation and has been a member of the Court of Appeals for the District of Columbia since 1935, received from President Truman on February 12 the Medal of Merit for the performance of outstanding services in wartime, as American Chairman of the Joint British-American Patent Committee from December 7, 1943, to October 1, 1946. The presentation was made by Dean Acheson, the District of Columbia lawyer who is Under-Secretary of State, at his office. The citation read:

> Through Justice Stephens' leadership, ability, industry, patience and tact, his efforts resulted in an important contribution to the war production program, to the maintenance of good-will between the United States and Great Britain, and to the support and satisfaction of the owners of patent rights and unpatented technical information.

STEPHENS was born in Crete, Nebraska, in 1886. He attended the University of Utah, Cornell University, and Harvard Law School. From the last named he received his LL.B. degree in 1913. Admitted to the Bar in Utah, he practised law in Salt Lake City, and served as a judge of the State District Court. After being an Assistant Attorney General of the United States, he was appointed to his present post in 1935.

STEPHENS' record on the bench has been outstanding and has led to his being strongly considered for appointment to the Supreme Court of the United States. He has been a member of our Association since 1922, and has taken a keen interest in many of its activities, including the JOURNAL. His memorial sketch of the late Mr. Justice George Sutherland, of Utah and the great Court, a former President of our Association, is regarded as a classic in legal literature (see 31 A.B.A.J. 446-453). His portrayal of his former colleague in the Court, Fred M. Vinson, at the time of the latter's appointment as Chief Justice of the United States, was widely read by members of the profession.

The work for which he received the Medal of Merit was done, characteristically, without its being publicized or proclaimed. Great usefulness and worth were attributed to it by those familiar with the manner in which he discharged his duties.

Francis BIDDLE

■ Former Attorney General FRANCIS BIDDLE, predecessor of Tom C. Clark as law officer of the Government of the United States, has been chosen by President Truman to succeed Former Governor John G. Winant, wartime Ambassador to Great Britain, as the representative of America on the controversial Economic and Social Council of The United Nations. This will add another chapter to the many-sided career of this Philadelphia lawyer of distinguished lineage and versatile services to the economic and social policies of America's "left wing".

Educated at Groton and at Harvard College, and belonging as of right to Philadelphia's venerated clan in the law, BIDDLE has served the Government in many capacities —Chairman of the National Labor Board, Judge of the Circuit Court of Appeals for the Third Circuit, Attorney General under President Franklin D. Roosevelt, American Member of the Military Tribunal at Nuremberg. He has been a member of the American Bar Association

since 1924, and was an honor guest and speaker at the 1946 Annual Meeting at Atlantic City. In his new post he is regarded as likely to maintain unbroken the advocacy of "radical" policies which has been characteristic of the representation of the United States in the Economic and Social Council and its sub-commissions.

Ruth HALE

■ The first woman Chancellor in the history of the United States assumed her duties on the bench of Arkansas' Pulaski County Second Division Chancery Court in Little Rock on February 8 with the formation of the new tribunal through legislative action. Named to the high post was former Master in Chancery RUTH F. HALE, who received her oath of office less than twenty-four hours after the signing of the new law. She was sworn in by First Division Circuit Judge Gus Fulk, dean jurist of that judicial district.

Chancellor HALE assumed the role of a judge in equity as dean of an unofficial "Court of Domestic Relations", so termed because of the type of cases to be heard in her Court. Her first official act was the granting of two divorce decrees on a "jam-packed" docket that has been backlogged for several months, due to a heavy calendar of cases throughout the district. The new Division of Chancery, which is in effect a Court of human and domestic relations, was set up under the guidance of First Division Chancellor Frank Dodge, who had the bill prepared to relieve some of the strain on his over-taxed docket.

Originally, he had planned to ask the Legislature to provide him with a Court of Domestic Relations under the complete jurisdiction of Chancery Court, which would include juvenile delinquents, divorce, and child abandonment hearings. After conferring with legal experts over the State, the Chancellor learned that there would be no legality for such a move, but that it would be lawful to divide his equity Court into two divisions, in such a manner that he could fulfill his purpose.

His proposal was backed by the Arkansas, Pulaski and Little Rock Bar Associations, and was in the hands of a special committee of attorneys to determine its legality, prior to introduction in the 1947 General Assembly. The bill was introduced into the House of Representatives only ten days before it was passed. It was signed by Governor Ben Laney. Chancellor HALE is holding hearings in her old Master-in-Chancery offices until the custodians of the court-house can prepare a court-room for her in the four-story building. Types of cases to be heard in her Court will include divorce, child abandonment, annulment, and separate maintenance suits, all of which will be relayed to her Court from the present First Division's docket. She will lend judicial advice to the present juvenile Court. Plans for the next general election call for the incorporation of this type of work under her jurisdiction.

Under the State Constitution, a domestic relations Court cannot be formed in Arkansas, as the Constitution provides for a definite procedure in handling and operating the juvenile Court system of the State. However, both Chancellors have indicated that referendum action to amend the Constitution so that this type of work can be coupled into the litigation of the Second Division Chancery Court, will be introduced at the 1948 general elections or the 1949 General Assembly.

Under provisions of the new statute, the appointive position is open only to Chancellor HALE until the general election, with a salary of $4,800 a year. After that time the position will be elective, and will carry a six-year term of office at a salary of $6,000.

In order to set forth the rules and policies of her newly created Court, Chancellor HALE will call a meeting of all interested attorneys in her four-county district to discuss functions of the tribunal. Virtually every attorney in the District has indicated his pleasure in being able to serve with Chancellor HALE, who has been a Master in Chancery under Chancellor Dodge since 1943. During her service in that post, she has heard every uncontested divorce case presented in the Pulaski Court in equity.

Her experience in divorce and domestic relations work has been diversified and well rounded. Prior to receiving the appointment as Master, she served from 1941 to 1943 as a domestic relations officer on the staff of Pulaski County's Prosecuting Attorney, Sam Robinson.

A native of Little Rock, Chancellor HALE graduated from Little Rock Senior High School and received her LL.B. degree from the University of Arkansas Law School in 1936. She was licensed to practice before the Arkansas Supreme Court in 1937, after taking courses in sociology, psychology and mental hygiene in the State University. After practicing law in Little Rock for four years, she joined the prosecuting attorney's staff as a deputy prosecutor in charge of the bureau of domestic relations in 1941.

Chancellor HALE is secretary of the Little Rock Bar Association and a member of the Arkansas Bar. A member of the National Association of Woman Lawyers, she is serving at present as State director for that organization and is a member of the Board of Control of the Training School for Girls and Reformatory for Women. She also holds the position of Vice President of the League of Women voters in Arkansas. Upon receiving her oath of office, Chancellor HALE said: "I am indeed grateful for the honor and appointment of serving as Chancellor in the Second Division Pulaski Chancery Court. I feel that the office offers a rare opportunity for service."

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Administrative Law . . Administrative Procedure Act . . § 10(d) confers upon the U. S. District Courts jurisdiction to review final agency orders only . . statutory provision is necessary to permit relief from denial of preliminary stay.

■ On December 20, 1946, the United States District Court for the Northern District of Ohio, Eastern Division, in the case of *Avon Dairy Co., et al.*, v. *Eisaman*, had before it one of the first cases involving the Administrative Procedure Act. The plaintiff, by its complaint, sought a preliminary injunction, pending the disposition of proceedings then before the Secretary of Agriculture, restraining the defendant Market Administrator's enforcement as to them of Order 75 promulgated under the Agricultural Marketing Agreement Act. A motion to dismiss the complaint was made by the defendant on the ground that the Court lacked jurisdiction to review the Secretary's action until he had heard and finally decided the plaintiff's petition for relief and that that petition was still pending undetermined before him. The plaintiff asserted that a postponement of the effective date of Order 75 had been requested but had been denied by the Judicial Officer of the Secretary of Agriculture. To uphold its contention that the Court, being a potential reviewing court of the action taken by the Secretary, had jurisdiction to prevent irreparable injury by issuing the injunction, the plaintiff relied upon § 10(d) of the Administrative Procedure Act which provides that "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." The Court refused to give cognizance to the construction urged by the plaintiff, holding that, under the statute, jurisdiction to issue a preliminary injunction was not exercisable by the court until the final adverse action of the Secretary was pending before it. The Court concluded that, there being no statute making reviewable the denial of the application for the stay before the Secretary of Agriculture, there was no jurisdiction to grant relief therefrom and the complaint was dismissed.

Attorney and Client . . integration of Bar should be denied where not in public interest . . where no exigency exists integration denied despite statutory authority.

■ On December 18, 1946, the Wisconsin Supreme Court denied a motion and dismissed a petition requesting that the Court proceed with the *Matter of the Integration of the Bar* pursuant to Ch. 315, Laws of 1943. In accordance with court order, briefs had been filed and arguments heard upon certain designated questions bearing on the subject. It was assumed by the Court without deciding that the questions dealing with the constitutionality of integration would be answered in its favor. The Court asserted that the matter before it rested upon whether or not integration would be in the public interest, and it stated that this consideration was closely related to the question whether payment of fees could be imposed as a condition of membership since to integrate the Bar without fees would be useless. It based its decision that fees could be imposed as a condition of membership upon its inherent power to require the Bar, as officers of the Court, to act as a unit if exigencies called for it and upon its ability to implement this power by requiring contributions. Upon an examination of the possible activities of the Bar, the conclusion was reached that the Court's relation to the Bar would require it to censor its budgets and activities after integration. This conclusion was of great weight in the Court's final decision, for it stated that "the price of integration would be much greater than this court or any lawyer ought to be willing to pay, unless the exigencies in respect to standards of admission and discipline are so great as to warrant adoption of some such expedient, either temporarily or upon a limited scale." Since there was no contention or suggestion that problems of admission and discipline were not being taken care of well, the Court held that all the desirable results of an integrated Bar would also result from an adequately supported voluntary association and that, while the enactment of Ch. 315, Laws of 1943, might be considered a declaration of public policy and was entitled to great consideration, carrying it into effect would cause a series of situations to arise which would be embarrassing to the relations of bench and Bar.

Bankruptcy . . holder of foreign-state judgment allowed to introduce evidence outside record to show that underlying debt was not a dischargeable one and thus that the defense of discharge was not available to debtor.

■ The Connecticut Supreme Court

of Errors, on December 31, 1946, held that the Superior Court had improperly granted a stay of execution against the defendant's wages in the case of *Fidelity & Casualty Co. of N.Y.* v. *Golombosky*. The plaintiff sought recovery upon a judgment it had obtained in a Pennsylvania court upon a note containing a confession of judgment executed by the defendant to the plaintiff. The Superior Court granted judgment and the defendant made motions to stay the execution on the ground that the debt evidenced by the Pennsylvania judgment was included within a discharge he had obtained in bankruptcy. It was the contention of the plaintiff that the note was without consideration other than a pre-existing debt owed the plaintiff by the defendant which was created by his "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity," and that the discharge was not a good defense since §17 (4) of the Bankruptcy Act provides that such debts shall be excluded from the dischargeable class. Evidence supporting the plaintiff's allegation was excluded by the trial court on the ground that the debt to the plaintiff was "created" by the judgment. The question presented on appeal was whether or not the fact that the judgment was based upon a note precluded the admission of the evidence showing that the debt which the note represented fell within §17 (4). The Court felt that the decisions which had held that, in determining the nature of the indebtedness, a court could not go behind the judgment and record had generally overlooked two principles: that where an action is brought upon a note, and a discharge in bankruptcy is set up as a defense, proof is admissible to show that the underlying debt was created by fraud or one of the other excepted causes; and that the rendition of a judgment upon an obligation does not change the character of the indebtedness. The intention of Congress to relieve only the honest debtor was also a factor influencing the decision of the Court. It stated that, in allowing the admission of extraneous evidence it was not allowing an attack upon the judgment, but that the plaintiff was attacking the defendant's right to the defense of discharge and was throughout insisting upon the right to recover upon the judgment in the manner and form in which it was rendered.

Dickenson, J., dissented on the ground that, while the trial court could go behind the judgment to ascertain the character of an action, it could not do so to establish a different cause. He pointed out incidentally that the judgment was based upon a note including a provision for a 10% attorney's fee.

Conflict of Laws. . custody of infants . . until such time as the children become domiciled in another state, decrees of the courts of the state of the divorce awarding custody must be given full credit by the courts of other states. . a parent acting in disobedience to a court order cannot secure a new domicile for the child.

■ On November 21, 1946, the Washington Supreme Court reversed an order of the trial court in the case of *Mullins* v. *Mullins* (174 P. 2d 790) and granted to the applicant a writ of habeas corpus ordering the defendant, his former wife, to produce their child and to surrender his possession to the applicant. The defendant had been awarded the child's custody, subject to the applicant's rights of visitation, by the terms of an Ohio divorce decree. Subsequently, the same court had given the defendant permission to take the child to the Pacific Coast for a period "not to exceed two months." Contrary to that order, she retained him in the State of Washington for a period in excess of four months, whereupon the applicant petitioned the Ohio court for custody of the child and was granted such custody. Upon this award, the applicant based his case for the writ of habeas corpus. The Supreme Court disagreed with the trial court's conclusion that the Ohio Court lacked jurisdiction to award the custody of the child to the applicant. It stated that, by the great weight of authority, the jurisdiction of the court rendering the decree of divorce continued as to the custody of children of the parties and that the decrees of a court of a sister state must be given credit in cases in which such court had jurisdiction. It held that it would not consider the change of custody of children whose custody had been determined by a court of a sister state, until such time as the children became domiciled in Washington, and that, in the present case, the child was not domiciled in Washington since the child himself could not change his domicile because of his minority and since reasoning and justice demanded that a parent acting in disobedience to a court order could not secure a new domicile for the child. In respect to the view of the trial court that a return of the child to Ohio would be detrimental to his welfare, the Court said that it was conscious of the fact that the courts of sister states were as well able to make provision for the children as it was.

Corporate Reorganization . . unless there is a clear abuse of discretion, orders of District Court as to allowance of claims and expenses will not be disturbed on appeal. . services are not compensable where rendered primarily for special clients and not of benefit to the general estate or its administration.

■ In the *Matter of Mt. Forest Fur Farms of America* (157 F. 2d 640), decided on October 9, 1946, the Sixth United States Circuit Court of Appeals affirmed the District Court's orders of allowance and disallowance of fees claimed and expenses incurred in connection with the reorganization of the debtor corporation under Chapter X of the Bankruptcy Act. The total amount of claims against the estate exceeded one-half million dollars; by the trustee's estimate, the assets of the debtor were worth $1,500,000. The Court pointed out that the policy of the Bankruptcy Act was to reduce to a minimum the cost of administering

estates, and decisions of the Supreme Court denouncing the allowance of excessive claims were quoted. The Court stated that more lip service than decisive application had been given the principle that burdensome fees and expenses must be avoided. That orders of the District Court will not be disturbed on appeal in the absence of a clear abuse of discretion was held to be the rule, and no abuse was found in the present case, although one fee allowed was said to have been more than the reviewing court "could in conscience have allowed." The Court held that fees were properly denied where services were rendered primarily for the benefit of special clients and did not aid the general debtor's estate. Miller, J., disagreed with this last view, being of the opinion that the Act did not impose a limitation upon claims where the services were primarily for the benefit of special clients but that, on the contrary, it authorized compensation to such claimants if either the services contributed to the plan or were beneficial in the administration of the estate.

Criminal Law. . conviction for violation of the mail frauds statute affirmed. . motion for a directed verdict should be overruled where a reasonable mind might be convinced of guilt beyond a reasonable doubt.

▪ The denial of motions by the defendants for directed verdicts of acquittal and the convictions of the defendants for violation of and conspiracy to violate the mail frauds statute in the case of *Curley et al.* v. *United States* were affirmed by the District of Columbia Court of Appeals on January 13, 1947. The defendants, Curley, Fuller, and Smith, were respectively president, vice-president, and treasurer of an organization known as Engineers Group, Inc. The Court found Fuller and Smith had made misrepresentations in the name of the Group in the negotiation and execution of contracts in relation to the procurement of government war work and housing construction. Curley's participation in the Group's activities consisted of introducing clients to Fuller; making statements such as "Fuller, 'our man in Washington,' had a project that was all ready to materialize, all ready to go"; and attempting to arrange a loan from a bank with the understanding that the money would not be withdrawn but that the bank would advise inquirers that the Group had that amount on deposit. Curley had not executed any contracts, signed any letters, or, so far as shown by the record, known of the widely distributed brochure which contained inducing misrepresentations. Ecexpt for $3500 used by him to take up a check payable to Fuller, there was no evidence that Curley had received any money from the organization. It was his main contention that the test by which a trial judge must determine the proper action upon a motion for directed verdict was that "unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him." The Court ruled that such language, which had been used in its own previous decision of *Hammond* v. *United States* (127 F. 2d 752), was misleading, if not erroneous, as a guide for passing on such a motion, but asserted that it was correct for instructions to the jury. The Court conceded that the language would have been a correct statement of the law in some of the other circuits. According to the majority, a trial judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind; if he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion, but if he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. The Court recognized the presumption of innocence, but held that persuasion of guilt beyond a reasonable doubt overcomes the presumption.

Miller, J., dissenting, thought that the rule stated in the *Hammond* case should have been literally applied.

Fair Labor Standards Act. . "portal-to-portal pay". . walking and preliminary activities time as part of statutory workweek. . 3 minutes preliminary activities and 6.2 minutes walking de minimis. . walking to and from lunch and from work bench back to time clock not compensable . . approval of method by authorities precludes retroactive change.

▪ The United States District Court for the Eastern District of Michigan, Southern Division, on February 8, 1947, handed down an opinion in the celebrated case of *Anderson* v. *Mt. Clemens Pottery Company*, holding that plaintiff employees had not established any right to overtime pay. The Court emphasized the fact that the case had been brought to recover overtime under the Fair Labor Standards Act based upon the rendition of productive labor for periods between the time of punching the time clock and the time when productive labor was officially scheduled to start and finish. This was contrasted with the decision of the Circuit Court of Appeals (149 F. (2d) 461) that no productive labor was rendered in those periods and the decision of the Supreme Court (67 Sup. Ct. Rep. 25) to the same effect but holding that parts of those periods devoted to walking time and preliminary activities must be considered to be in the statutory workweek, and the damages, if any, assessed with due regard to the de minimis rule and "in the light of the realities of the industrial world". The Court concluded that, on the most liberal interpretation of the opinion of the Supreme Court contended for by plaintiffs, the sum total of preliminary activities time for any one person would be less than 3 minutes a day and the maximum walking time

6.2 minutes a day. Cases and rulings were cited to show that much longer periods had been disregarded under the de minimis rule. Notice was taken of plaintiffs' interpretation of the Supreme Court opinion as indicating that walking time of over twelve minutes could not be disregarded under the de minimis rule but the Court held that the opinion, by suggesting the test of convenience and necessity of the employees, had ruled out time devoted to walking to and from lunch at noon and from the work-bench to the time clock at the end of the day. Compensable walking time computed under those conditions would not exceed the 6.2 minutes a day above referred to. The Court therefore held that all the walking and preliminary activities time consumed was de minimis. The Court further held, in effect, that the action in 1939 of the Department administering the Wage and Hour Act, in approving the employer's method of computing time and overtime, required that any change such as was contended for by plaintiffs should be applied prospectively only. The opinion closes with a caveat that there may in other cases be instances where walking and preliminary activities time are of such an amount as to call for additional compensation.

Labor Law. . National Labor Relations Act . . discriminatory discharge for union activity in violation of employees' guaranteed rights.

■ On January 3, 1947, the National Labor Relations Board, in the matter of *Fisher Governor Co.* v. *International Association of Machinists, District No. 118,* adopted the finding of the Trial Examiner that the company had discharged employees because of their union activities in violation of §8 (3) of the National Labor Relations Act (which provides that discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization is an unfair labor practice), but reversed his finding that a speech made by the company's vice-president and the granting of certain wage increases and bonuses to employees constituted interference, restraint and coercion within the meaning of §8(1) of the Act (which declares that interference, restraint and coercion in the exercise of the rights guaranteed in §7 shall be an unfair labor practice). A majority of the Board found that two long-time employees were discharged by the company because of their approaching other employees to join the union, thus violating an alleged company rule forbidding such solicitations in its plant. Ten days later the company's employees, who were assembled in the plant during working hours, were addressed by the vice-president on the company's views on unionization. He pointed out that they had received substantial benefits from the company in the past without the assistance of a labor organization, and declared that representation by an "outsider" was not necessary for them in their dealings with the company. At the close of the address, an announcement was made of a wage increase effective the next day. Member Reynolds and Member Houston were of the opinion that the rule in question merely prohibited the collection of money for private gifts or public charities and that it could not reasonably be construed by the employees as prohibiting union solicitations in the plant. They thought that the conduct of the employees did not contravene a rule against unreasonable visiting among employees or, since the amount of time spent was negligible, interfere with production. They found, in the light of the vice-president's speech and in view of the disparity in treatment of non-union employees who were merely reprimanded for visiting in the plant, that the discharges were made because of the employees' union activities and that the company had thereby discriminated in regard to their hire or tenure of employment to discourage membership in a labor organization, and had interfered with, restrained and coerced the employees in the exercise of the rights to self-organization, to form, join or assist labor organizations, to bargain collectively, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed them in §7 of the Act. While that part of the complaint which attacked the vice-president's speech and the wage increases was dismissed by a two-to-one vote, the two prevailing members did not concur in the reasons for their positions so that there is no majority opinion on those subjects. The discussion disclosed that the important question was still open whether the order of the Board containing the usual prohibition against interference with the rights granted by §7 would forbid further utterances on the same subject by the company.

Military Law. . the United States Court of Claims has jurisdiction to disregard a verdict by a court martial when the judgment is void. . the verdict is void when constitutional rights are denied.

■ The United States Court of Claims, in the case of *Shapiro* v. *United States,* decided January 6, 1947, overruled the defendant's demurrer. Suit had been brought by the plaintiff to recover his salary as a Second Lieutenant in the United States Army after the date of his court martial and dismissal. The court martial had convicted him of "a delay in the orderly progress" of another court martial where he had acted as defense counsel. To support the accused's plea of mistaken identity in an attempted rape case, Shapiro had substituted another soldier who was identified by the prosecuting witnesses and convicted. When Shapiro disclosed the deception the accused was put on trial and convicted and Shapiro's conviction and dismissal followed. He was subsequently pardoned by the President. It was his contention in the Court of Claims that the court martial which had convicted him had no jurisdiction to render the verdict, and that hence, the dismissal was illegal. He alleged that charges were served upon him at 12:40 p.m. and that he was notified that he would be tried at 2:00 p.m. on the same day at a

town 35 to 40 miles from the place where the charges were served. He selected two lieutenants to represent him at the trial. His motion for a continuance of seven days on the ground that his counsel had not had sufficient time to prepare his defense was denied and he was convicted and dismissed. The Court, without condoning the deception, said that the verdict was evidently rendered in spite and held that the case was one of almost complete denial of constitutional rights applicable in military tribunals as well as in civil ones. In its opinion, both the due process clause of the Fifth Amendment and the Sixth Amendment's guarantee of the right of counsel were violated. On the question of whether or not the court had jurisdiction, it recognized that it had no power to give relief unless the verdict was absolutely void since it had no appellate jurisdiction over the court martial proceedings. It stated that, as the court martial had jurisdiction of the case, ordinarily, it would follow that any judgment rendered by it, however erroneous, would not be void, but it held that the conviction was void and the dismissal illegal in the present case since there was a denial of the plaintiff's constitutional rights. The Court called attention to the fact that the President had granted the plaintiff an unconditional pardon so that any forfeited civil rights might be restored. Whalley, C. J., dissented on the ground that the Court had no appellate jurisdiction and that the plaintiff could not recover unless the verdict of the court martial was set aside.

Patent Office . . Trade-Mark Counsel.

■ On January 29, 1947, Patent Commissioner Casper W. Ooms announced the appointment of Mr. Walter J. Derenberg as Trade-Mark Counsel for the Patent Office. Mr. Derenberg is the author of *Trade-Mark Protection and Unfair Trading* and is an editor of the *Trade-Mark Reporter*. He also took part in the drafting of the Lanham Trade-Mark Act which goes into effect in July, 1947.

Patents . . a patent is void under federal law where not issued to the true inventor . . a federal court will not order an assignment of such a patent . . *Becher* v. *Contoure Laboratories, Inc.*, distinguishable.

■ In the case of *Crook et al.* v. *Bendix Aviation Corp.*, decided November 12, 1946, the United States District Court for the District of Delaware followed the principle laid down in the case of *Kennedy* v. *Hazelton* (128 U. S. 667) that a patent applied for by one who is not the true inventor is unauthorized by law and void whether taken out in the name of the applicant or of his assignee, and applied the rule that a federal court will not order an assignment of such a patent. By count 3 of the complaint, the plaintiffs had sought to have assigned to them four patents which had been issued to the assignors of the defendant. They had alleged that the defendant was trustee *ex maleficio*, as the assignors were not the first inventors of the subject matter of the specifications and claims of the patents, and that one of the plaintiffs was the true inventor. Under the above-quoted rule, the Court held that the count should be dismissed since, under the *Kennedy* case, the patent was void and there can be neither legal nor equitable ownership of a void patent. The Court refused to give effect to the plaintiffs' argument that the *Kennedy* case was overruled by the Supreme Court in the case of *Becher* v. *Contoure Laboratories, Inc.* (279 U. S. 388) saying that the state court order approved in that case, although assigning a patent void under the *Kennedy* rule, was all that the state court possibly could have done since jurisdiction to declare patents void rests exclusively with the federal courts.

Security Trading . . Securities Exchange Act of 1934 . . the exercise of an option of conversion is a purchase within the Act . . purchase price is market value of stock converted on the conversion date . . minority shareholder should be allowed to intervene where the accused violator of the Act is dominant in the plaintiff corporation's affairs.

■ On January 8, 1947, the Second United States Circuit Court of Appeals remanded the case of *Park & Tilford, Inc.* v. *Schulte et al.* for entry of an increased judgment for the corporation and reversed the lower court's order denying a minority stockholder permission to intervene. The action was brought against the defendants as trustees under § 16 (b) of the Securities Exchange Act of 1934, which provides that profit realized "from any purchase and sale, or any sale and purchase, of any equity security" of a corporation within any period of less than six months by a beneficial owner of more than 10 per cent of any class of any equity security shall inure to the benefit of the corporation, unless acquired in good faith in connection with a previous debt. In 1943, the defendants owned a majority of the corporation's common stock and also part of its preferred stock, which was redeemable by the corporation upon notice and convertible by the shareholder into common stock until the redemption date. On December 20, 1943, notice of redemption was given by the corporation, and on January 19, 1944, defendants converted their preferred holdings, worth $364,871 on that date, into common stock, worth $480,853.78. Within six months, defendants sold the common stock for $782,999.59.

The Court held that a conversion fell within the Act's definition of an initial purchase since the defendants acquired the common stock in question by exercising their option to convert and the Act applied to executed acquisitions. It refused to hold that the transaction fell within the exception in § 16 (b), saying that under the circumstances an equity interest, and not a creditor's interest, was created. Nor would the Court uphold the contention, which it termed "absurd", that the conversion was a forced one. The defendants' further argument that § 16 (b), as applied to the present situation, was unconstitutional was asserted to be entirely without merit. The lower

Court was held to have committed error in taking as the purchase price the market value of the common, rather than that of the preferred stock, on the conversion date, and in not permitting stockholder representation so as to "guard against even the appearance of any concerted action" in a case where the interest of the defendants was so dominant in the corporation.

United States Government . . attorneys having no connection with the Department of Justice can bind the Government by an appearance in Court.

■ On December 12, 1946, the United States District Court for the Northern District of West Virginia ruled as a matter of law in favor of the defendant in the case of *United States* v. *Muntzing*. The action was brought against the defendant personally to recover the unpaid balance due upon a promissory note executed by one Conard to the Secretary of Agriculture and secured by a chattel mortgage upon certain crops. Upon the death of Conard, the defendant had been appointed and qualified as administrator of Conard's estate. Finding that the personalty of the estate would not be sufficient to cover the deceased's debts, he had instituted a suit in chancery to subject the realty to their payment and to settle the estate. A proof of claim on the note by the Regional Attorney for the Farm Credit Administration was delivered to the Commissioner in Chancery who allowed it as a common claim against the estate since none of the property secured by the lien was in existence at the time of Conard's death. The allowance was confirmed by the Circuit Court and payment of the amount allowed was sent to the Regional Attorney. It was the contention of the Government that the debt was a claim by the United States and so fell under Title 31, §§ 191 and 192, United States Code, which provides that ". . . whenever the estate of any deceased debtor, in the hands of the . . . administrators, is insufficient to pay all the debts due from the deceased; the debts due the United States shall be first satisfied . . ." and that "every . . . administrator, . . . who pays any debt due by the . . . estate . . . for which he acts, before he satisfies and pays the debts due to the United States from such . . . estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." The Government also contended that it was not bound by the decision of the state court since only the Attorney General of the United States, or some one authorized to act for him, could bind the Government by an appearance in court. The Court agreed that the claim was one by the United States within Title 31, §§191 and 192, United States Code, but held that the Government had subjected itself to the jurisdiction of the state tribunal and so was bound by its decision. That only the Attorney General or some one acting under his authority could bind the United States by an appearance in court was conceded to have formerly been the law; the Court, however, recognized the fact that recently the Government had often been represented by attorneys having no connection with the Department of Justice and stated that the rule "has simply been changed apparently by general consent of the Courts and the Government" for "it has gotten to the place where it is the exception, rather than the rule, to have the United States Attorney counsel for the Government in a civil action."

Workmen's Compensation . . limitations . . proceedings must be brought within one year of accident when the accident and injury occurred simultaneously even though the injury was diagnosed incorrectly and its exact nature not discovered until after the year had elapsed.

■ In the case of *Stephenson* v. *McCook Bros. Funeral Homes Inc., et al.* (27 So. 2d 644), decided on October 31, 1946, the Court of Appeal of Louisiana, Second Circuit, affirmed the decision of the District Court sustaining the defendant's plea of prescription or peremption. Proceedings were brought to recover compensation for an injury suffered by an employee in July, 1944. His trouble was diagnosed as "chronic non-specific prostatitis" and it was not until April 18, 1945, that he discovered that his spine had been injured although he had had to leave his employment after the injury and had constantly been in pain since the accident. The defendant's plea of prescription or peremption was based upon § 31 of Act No. 20 of 1914, as amended by Act. No. 29 of 1934, which provided that proceedings for personal injury must be brought within one year from the date of the accident except where the injury did not develop immediately after the accident in which case suit must be brought within one year after the development. The Court held that, since the petition was replete with allegations of pain and suffering continuously from the time of the accident, the accident and injury occurred at the same time. The fact that the exact nature of the injury was not known until April 18, 1945, was held to be immaterial.

Workmen's Compensation . . medical testimony may not be disregarded in awarding compensation . . independent examination of medical authorities made by court to aid in reaching decision.

■ An award by the Workmen's Compensation Bureau in favor of an employee for loss of the sight of one eye was reversed by the New Jersey Supreme Court, on October 10, 1946, in the case of *Thackston* v. *Lansdell Co.* (134 N.J.L. 520, 49 Atl. 2d 140). It was the employee's contention that his impaired vision resulted from his working, while in the defendant's employ, with hot tar which emitted smoke and fumes and caused his eyes to smart and burn. Examinations during his treatment had failed to show anything wrong with him other than a tooth with a root abscess which, when removed, disclosed a streptococcus viridans infection. Both of the doctors who testified agreed that the cause of blindness was uveitis, an inflammation on the inside of the eye. One of them, the doctor who had treated the eye, stated, in spite

of the streptococcus viridans infection, that the employee "did not have any of the usual diseases to which this condition is attributable" and that he believed the fumes precipitated the inflammation. The other was of the opinion that uveitis was always due to a constitutional cause and might have been caused by streptococcus viridans. In awarding compensation, the deputy commissioner had stated that the main controversy was a medical one but that a decision would never be reached if handled from the medical angle, and that compensation cases were tried on legal theories, not medical ones. The Court did not agree with this view but said, on the contrary, that no legal theory allowed courts to disregard the medical theories advanced by one side or the other, since courts had the duty to examine and weigh the evidence and to determine on which side it preponderated. In the Court's view, where the facts could not be established otherwise, a case might of necessity be tried on medical theories. The Court made an independent examination of medical authorities and concluded that streptococcus viridans from dental infection was a recognized cause of uveitis. In light of the medical testimony and of the independent examination, it was held that the employee had not sustained the burden of proof since the more probable hypothesis was that the loss of vision was due to disease brought on by the streptococcus viridans infection.

First 1947 Regional Meeting in Omaha

■ The first of the 1947 Regional Meetings of the Association under the new constitutional provision (33 A.B.A.J. 183) was held at the Hotel Paxton, in Omaha, Nebraska, on January 24 and 25, with President Carl B. Rix in the chair.

The total registration was 311, with an attendance of about that number at all sessions except for the Saturday morning discussion of labor relations law, for which the attendance exceeded 400. The meeting was under the direction of the Board of Governors Committee on Regional Meetings, which consists of Harold H. Bredell, of Indiana; Deane C. Davis, of Vermont, and William O. Wilson, of Wyoming, in cooperation with Joseph D. Stecher, of Ohio; Charles B. Stephens, of Illinois; Ronald J. Foulis, of Missouri, and Paul B. DeWitt, of New York.

The States particularly covered by this Regional Meeting, with their respective Committee members, were:

NEBRASKA: George H. Turner, Lincoln, *Chairman;* COLORADO: James A. Woods, Denver; IOWA: Frederic M. Miller, Des Moines; KANSAS: Andrew F. Schoeppel, Topeka; MINNESOTA: Morris B. Mitchell, Minneapolis; MISSOURI: Kenneth Teasdale, St. Louis; MONTANA: Julius J. Wuerthner, Great Falls; NEBRASKA: Clarence A. Davis, Lincoln, and Fred S. Berry, Wayne; NORTH DAKOTA: Herbert Nilles, Fargo; SOUTH DAKOTA: Roy E. Willy, Sioux Falls; WYOMING: Charles E. Lane, Cheyenne.

The Local Committee on Arrangements were Daniel J. Gross, Omaha, Chairman; Raymond M. Crossman, Omaha; Robert R. Moodie, West Point; G. F. Nye, Omaha; Virgil Northwall, Omaha; and Theodore L. Richling, Omaha.

Those who attended were enthusiastic about the meeting and its diversified program. They expressed themselves as having received inspiration and useful assistance. At the opening session on Friday, the address of welcome was given by United States District Attorney Joseph T. Votava, of Omaha, the President of the Nebraska State Bar Association. The response, with a statement of the purposes of the Regional Meetings, was made by President Carl B. Rix, of our Association.

Participants in a Forum on Administrative Procedure and Practice were Sylvester C. Smith, Jr., of Newark, New Jersey, Chairman of the Section of Administrative Law; Ashley Sellers, of Washington, D. C., formerly Special Assistant to the Attorney General; Ralph M. Hoyt, of Milwaukee, Wisconsin, and Gilbert Nurick, of Harrisburg, Pennsylvania.

The principal speaker at the dinner was Honorable Manley O. Hudson, former Judge of the World Court, who spoke on "Immediate Tasks Ahead in the Development of International Law."

Two forums were held during the second day's sessions. Speakers at the Forum on Labor Law were: Lee Pressman, of Washington, D. C.; Robert D. Morgan, of Chicago, Illinois, and Clif. Langsdale, of Kansas City, Chairman of the Section of Labor Law.

Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska presided over the Forum on Judicial Selection and Improving the Administration of Justice, and addresses were delivered by Laurance M. Hyde, of the Supreme Court of Missouri, and William W. Crowdus, of St. Louis, Missouri.

No Resolutions were adopted or offered in the Omaha Regional Meeting. As elsewhere announced in this issue, the second Regional Meeting for 1947 will be held in Jacksonville, Florida, on May 2 and 3.

17

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

■ Reasons for the creation of this new department, to stimulate and assist the interest of the average practising lawyer in the matters of international and comparative law with which he will need increasingly to be familiar, are confirmed in the following "review" by our Editor-in-Charge. Because it is so apt a "preface" or "introductory" to the establishment of this department, we have taken it from "Books for Lawyers" and placed it here.

The need that practising lawyers throughout the United States shall concern themselves with international law is attested also by the February Report of the Association's Committee on Peace and Law Through United Nations, which is quoted from on page 236 of this issue.

The purpose of the department will, we think, be fulfilled best by the publication of documents, source material, etc. Notes, comments, references, decisions of the World Court and of the Courts in this and other lands, on questions of international and world law, will also be included. Developments in The United Nations, as to international law, will be covered. The department will be for the information, assistance and interest of the lawyer in general practice, rather than primarily for specialists or legal scholars in the field. Documents prepared for the purposes of our Association's studies and formulations of the principles of international law are not available at this time. So we publish without present comment a contemporary document which may challenge the interest of members of the profession. It consists of the Proposals which on February 6 the United States Delegation to The United Nations submitted regarding an International Bill of Rights, to the Commission on Human Rights, which is an organ of the Economic and Social Council. W. L. R.

■ The Supreme Court of the United States recently affirmed the power of the federal government to tax mineral waters taken from Saratoga Springs, which are properties owned and operated by the State of New York (*New York* v. *United States*, 326 U. S. 572). Though the case seemed to relate to a purely internal American problem and not to come at all within the domain of conflict of laws or international law, the opinion of the Court contained references to Argentine, Australian, Brazilian and Canadian constitutional law and to five decisions of Brazilian Courts.

Thus our Supreme Court opened broad vistas upon green, untried pastures full of luscious precedents. One may expect that in a country committed to free competition, where big law firms always try to keep ahead of their competitors by having an up-to-date research department, some of these firms will take to heart what the Court did in the above-mentioned opinion. In consequence, comparative law research may some day flourish here, to an extent far surpassing that reached in other countries where this method is indulged in only by professors and research scholars.

At this right psychological moment, Mr. Gutteridge, Emeritus Professor of Comparative Law at the University of Cambridge, has published a stimulating book on comparative law.[1] It succeeds in destroying many misapprehensions about this method of legal research and in assigning to comparative law its proper place among the many subjects of legal study and practice.

Though Professor Gutteridge's book is directed mainly to an English audience, it can be read with advantage by American lawyers. In the United States, the diversity in State laws compels the lawyers to apply the comparative method of research, often quite unconsciously, in a variety of situations. But the efforts of the late Dean Wigmore, of the *Tulane Law Review*, of our Association's Section of International and Comparative Law, and other agencies, have not succeeded in bringing to the attention of American lawyers the advantages inherent in the study of foreign laws. The difficulties of a comparative study are often overemphasized, and there are but few law schools which dare to teach the subject, although it provides great opportunities for post-graduate research.

Similarly, the legal draftsmen of the various governmental departments and of Congressional committees seldom take advantage of foreign legislative and administrative experience, even where other guides are absent. This is particularly incomprehensible in fields of law of recent origin, such as telecommunications, air navigation and labor, where there are but few local prejudices to be reckoned with. Only indirectly, through the medium of international agreements, are some foreign rules able to influence our legislation.

Professor Gutteridge's book is not an essay on foreign laws but an outline of the possibilities for the application of the comparative method in the different fields of legal study.

1. Comparative Law. An introduction to the Comparative Method of Legal Research. By H. C. Gutteridge. Cambridge, England: The University Press; New York: The MacMillan Company, 1946. $3.00. Pages xvi, 208.

While his book is limited to private law, lawyers engaged in public law practice will find in it a number of helpful methodological hints. The author deals with the comparative study of both the case law and legislation. The chapter on the evaluation of the importance of judicial precedents in different systems of law is especially valuable, but the reader will miss a comparison between the British and American practice which are growing more and more apart.

The author's discussion of the movement for the unification of private law leads him to rather pessimistic conclusions. His recommendations of possible improvements in the method of unification are too limited in scope. But the chapters on unification present a detailed summary of past efforts and a useful analysis of the difficulties which have contributed to the failure of some of these attempts.

The chapter of the book which deals with legal education should be studied carefully by law school committees on curricula, as it contains many valuable suggestions. The libraries of some American law schools are in much better condition to afford opportunities for comparative law research than any other libraries in the world. The responsibility for keeping the flame of legal research burning rests thus squarely on their shoulders.

Both lawyers and law professors will derive a great number of stimulating ideas from this book; it may well become the standard introductory treatise on the subject.

U. S. Proposals to The United Nations as to an International Bill of Rights

The United States proposes:

1. That the Commission on Human Rights should consider the following questions at its forthcoming session before proceeding with the drafting of an International Bill of Rights:
   (a) The legal form of the bill;
   (b) The subject-matter to be dealt with in the bill;
   (c) The implementation of the bill;
2. That the Commission should, before adjourning,
   (a) Appoint a working group to draft an International Bill of Rights for submission to the Commission at its next session, following closely the Commission's decisions on the points listed in Paragraph (1) above; (b) Suggest methods of consulting with interested agencies, commissions, and sub-commissions in the drafting of an International Bill of Rights.

Specific Suggestions

1. With regard to the legal form of an International Bill of Rights, the United States suggests that the Commission should first prepare it in the form of a Declaration on Human Rights and Fundamental Freedoms to be adopted as a General Assembly Resolution. This Declaration should be of such a character as to command the respect of people throughout the world and should be framed with a view to speedy adoption by the General Assembly.

The resolution containing this Declaration should make provision for the subsequent preparation by the Commission on Human Rights of one or more conventions on human rights and fundamental freedoms. This course, it is thought, would permit prompt adoption of a broad statement of human rights and allow time for the working out of detailed treaty provisions on specific matters.

2. Among the categories of rights which, the United States suggests should be considered are the following:
   (a) Personal rights, such as freedom of speech, information, religion and rights of property;
   (b) Procedural rights, such as safeguards for persons accused of crime;
   (c) Social rights such as the right to employment and social security and the right to enjoy minimum standards of economic, social and cultural well-being;
   (d) Political rights, such as the right to citizenship and the right of citizens to participate in their government.

It is recognized that the definition of rights within these categories is a task of great difficulty, which cannot be performed by the Commission at its forthcoming session, but it is submitted that these categories taken together include the rights which persons of differing national, legal, economic, and social systems would regard as the human rights and fundamental freedoms to be promoted and respected by The United Nations.

3. With regard to implementation, the United States suggests that the General Assembly resolution setting forth the Declaration on Human Rights and Fundamental Freedoms should recommend the Declaration as a standard to be observed by Members. It might also recommend that these rights be incorporated in constitutions and in legislation, to be observed and enforced by administrative and judicial authorities.

The conventions suggested earlier might contain provisions for reporting by the signatories on the application of the convention and on the position of their law and practice regarding the rights stipulated in the convention. They might also, if feasible, empower the Commission on Human Rights to recommend to states measures to give effect to the convention.

4. The United States proposes the appointment of a working group to draft the Declaration since the Commission's agenda for the forthcoming meeting is long and the decisions to be reached with respect to the foregoing questions will require more extended consideration than will be possible at the forthcoming session of the Commission. The decisions with regard to subject-matter to be included would furnish leads to the drafting group to guide it in formulating specific provisions or in evaluating proposals which may be made or referred to it.

All bills which have been submitted to the Commission should be referred to the working group for study in the light of the decisions of principle reached by the Commission.

The subsequent drafting of conventions for submission by the Economic and Social Council to the General Assembly and adoption by Members might be performed by the same working group, or one or more new ones might be formed.

5. The Commission may consider it desirable to consult with organs, commissions, or specialized agencies of the United Nations with regard to the drafting of certain provisions. It might, therefore, suggest to the working group methods of consultation with these bodies.

6. In order to submit the Declaration on Human Rights, if possible, to the Second Session of the General Assembly, it is suggested that the working group complete its work in time for consideration by the Commission (possibly in June) and the Fifth Session of the Economic and Social Council (Summer 1947).

18

Military Justice:

Comments on Advisory Committee's Report

■ Our January issue gave a comprehensive summary (pages 40-41, 92) of the report and recommendations of the committee nominated by the President of our Association and appointed by Secretary of War Robert P. Patterson, to study the Army courts-martial system and to devise methods for improving it so as to conform it to American concepts of law-governed justice and fair play. An editorial also discussed the notable recommendations (33 A.B.A.J. 45).

All this was of course very vivid and interesting to the 5,000 members of our Association who have lately served their country in uniform during World War II. Many of them took part in administering military justice under the Articles of War in force. As takes place on virtually every subject which concerns the profession and the public, some of our lawyer-veterans have been impelled to write their views to their *Journal*. We are unable to publish all of the interesting and helpful communications received, on this subject or any other; but we try to find space for a few which seem to be typical and constructive. One of those published below is by Lt. Col. William T. Hornaday, for whose narration as to the re-dedication of Courts in France we belatedly found space in our February number (pages 137-138). Helping to improve military justice and its administration is a task which deserves a continuation of our Association's active efforts before the Congress and the War Department.

Less "Paper Work" Is Urged

I read your editorial with great interest ("Improving Military Justice," January issue; 33 A.B.A.J. 45). Having been a practicing lawyer for over fifteen years, four and one-half years of which were spent on active duty in legal billets with the Navy during the last war, I have read all such articles and editorials which have come to my attention. Having spent over two years during my active duty as a Staff Legal Officer at a base where the complement oftentimes consisted of about fifty thousand officers and men, I have been deeply impressed with the deficiencies of military justice actually practiced as distinguished from the theory and design set forth in "the book". However, my commanding officer, the Commander of the base, meticulously avoided interfering in any way with the administration of justice, so that none of the constructive criticism mentioned in your editorial is applicable to the base I have referred to, with the result that the commanding officer enjoyed the complete respect and admiration of all the men and officers in his command.

One matter that I noticed is not commented upon in your editorial, and which is often absent in other publications treating the same subject, concerns itself with the volume of unnecessary paper work which the system as designed required in order to satisfy "the book", as distinguished from the military justice practiced. I have reference to the large amount of negative facts which the record of each individual case is required to list in order to be complete. In this connection, administration of justice in criminal courts is an improvement upon military justice. Without casting reflections on

any one, and merely for the purpose of improving the system as designed, I have urged, and now take the opportunity to again urge, that records be unburdened of negative facts which serve no useful purpose in the final analysis and are merely required because "the book" says the record must so show. To delete these negative facts would act to improve military justice by reducing unnecessary man-hours employed to record and repeat such negative facts which in most cases become merely a matter of form and make possible innumerable mistakes which require further man-hours for correction in order that the record may be perfect by the time the reviewing authority has an opportunity to pass upon the same. Such a change would reduce the ordinary summary court record to less than two pages where the accused pleads guilty, whereas, as matters stood and, as I understand them, still stand, such a record in most cases is considerably longer than two pages of ordinary legal size paper.

SYDNEY P. MURMAN
San Francisco, California

Colonel Hornaday Hails the Report

With feelings of profound relief, I read the report of the Advisory Committee on Military Justice in your January issue. My feelings were of relief because the Committee, in its summary of shortcomings of the military justice system of our Army, named almost every single one about which I had heard complaints during almost five years of active duty during the war. Those complaints have been voiced to me not only by officers who have served as defense counsel, trial Judge Advocates and members of courts, but also by officers whose civilian occupation is the law and who have served as law members of general courts, as well as by officers of the Judge Advocate General's Department, with many of whom I served for over a year in the War Crimes Branch of the War Department. Many of the latter had served as Staff Judge Advocates or Assistant Staff Judge Advocates of commands of various sizes.

It is interesting that the majority of complaints voiced to me arose from the same source: The power of the command which named the court and appointed the trial Judge Advocate, or under whom the staff Judge Advocate served, over the court and its officials, or over the staff Judge Advocate on the staff of the command, and the frequency with which that power was used improperly by commanders to influence the court to make findings of guilty as to the accused, or to override the recommendations of the staff Judge Advocate, on review of a case, who found reversible error in the record, or to persuade the staff Judge Advocate to change his recommendations.

Such conditions existing in the systems are proof that the system itself, as it exists today, has weaknesses which are contrary to the American concept of justice. The same observations which the Honorable Robert H. Jackson made in his paper, "Lawyers Today: The Legal Profession in a World of Paradox", in discussing the Soviet system, which appeared in the same issue of the JOURNAL, apply equally well to our military justice system:

> The Soviet trial procedure, like our own, is capable of doing justice when in the hands of fair prosecutors and judges. The most serious weakness in either system is that an individual in the dock is so relatively helpless when confronted by the vast power of organized government. When a government has no concern in a trial except to see that truth prevails and justice is done, this disparity of strength is not serious. But when the interest of the government in any case is strong enough to tempt its prosecutors to strain to convict, the disparity becomes decisive. When this disposition to over-reach exists, the Soviet system offers few checks or remedies as compared with those available to a defendant in our law.

The analogy seems to me to be obvious.

The Committee's recommendations, particularly the ones for the revision of the *Courts-Martial Manual* to provide punishment for any person attempting to influence the action of appointing or reviewing authority on the action of any courts-martial, to prohibit reprimands of a court or of any of its members, to require law members and defense counsel to be appointed by the Judge Advocate General, and to provide for final review of the findings of all general courts by the Judge Advocate General's Department, are good, and should go a long way toward remedying the existing evils. To them should be added provision for punishment for reprimanding courts and their members, and punishment for reprimanding staff Judge Advocates for making recommendations contrary to the wishes of their commanders.

It is my opinion that none of these changes can be made simply through a revision of the *Courts Martial Manual*. They must be made by a Congressional revision of the Articles of War.

There is one additional evil that was not touched on by the Committee's report. Under the 104th Article of War, which provides the so-called "company punishment", the power to punish conferred on commanders is greatly limited. It applies to enlisted men only in time of peace, and to enlisted men and "company-grade" officers in time of war. The limitation on the punishment of confinement is one week, as to both. I have heard many complaints of abuse of that power, and I personally investigated one. In the latter, a second lieutenant, who had been completely exonerated of blame in the matter for which his act was being investigated by a Board of Inquiry, was informed by the Commanding General of his Armored Division that, in spite of the report of the Board, the lieutenant could choose between trial by court martial and trial under the 104th Article of War. The young lieutenant, being wrongfully advised by friends, chose the latter. The General peremptorily imposed a sentence of six months'

confinement on the lieutenant. The division staff Judge Advocate obviously was afraid of his General, and refused to act on appeal. The lieutenant was afraid to appeal to higher headquarters for fear that should his General's act be reversed, and the lieutenant should have the bad fortune not to be able to transfer to another organization, his life in the division would be unpleasant.

To overcome this evil, I submit that punishment should be prescribed by the Articles of War for officers who abuse their power.

WM. T. HORNADAY
Lt.-Colonel, M.I.-Res.
Richmond, Indiana

Sound Separations of Powers Are Seen as Recommended

There is little doubt in the minds of most of the young lawyers who were in the Armed Forces that investigation of the present system of military justice was a timely and wise step. Men who are required to serve in an army fighting for international justice rightly expect to find justice meted out to themselves and their brothers in uniform, by their own Army.

The report of Dean Vanderbilt's Committee (your January issue; 33 A.B.A.J. 40) represents careful factual analysis of the most frequent criticisms made of the Army's Courts-Martial system. It seems to me to be significant that none of these criticisms are aimed at the basis of the system itself. Most of the men who have sat in Courts-Martial or defended men accused before them will agree, I think, that if two main faults could be corrected, the system would be just, swift and certain. These factors were: (1) The lack of sufficient trained personnel; and (2) Attempts by command to control, influence, and interfere with Courts-Martial proceedings. Too many commands regarded the courts as a tool in their hands, failing to realize the damaging loss of morale among their troops that resulted from such action.

The recommendations of the Committee that any interference or attempts to influence the court or reviewing authority be prohibited will do much to correct this abuse. The provisions that the law member and defense counsel be members of the Judge Advocate General's Department and be named by the Department should provide key personnel beyond the influence of the command. Placing the final review of all general Courts-Martial in the Department will provide a further check. This separation of powers has long been recognized in our civil and criminal law, and our system of military law has been unprogressive by its failure to accept it.

The problem of insuring the adequate trained personnel to man Courts-Martial appears to be a more difficult one to solve. The present system requires that trained personnel be available in all units which are to exercise Courts-Martial jurisdiction. However, in an era of total war, this is almost an insurmountable difficulty. Such men were frequently unavailable in the most important units, the combat units, where there is a premium on youth and action. Men do not want to leave their combat assignments to serve on Courts, merely because they were admitted to the Bar before induction.

If the recommendations of the Committee are adopted by the Army, the Judge Advocate General's Department will be responsible for supplying a qualified law member and defense counsel from members of the Department. The importance of this measure can not be over-emphasized. But it will not be easy to do at all locations, without getting men too old and stuffy. The fact that a man has been an experienced lawyer does not automatically qualify him for serving on Courts-Martial. He needs the additional training and experience that are available to members of the Judge Advocate General's Department. There are new interests that he must learn to recognize and protect. The rights of the individual must be reconciled with the exigencies of war and military discipline, in faraway places as well as the large training-camps and bases.

However, I do not see that the recommendations of the Committee will correct one criticism which perhaps was the most frequently noticed and had the most depressing effect on the morale of the troops. This fault was the wide disparity and severity of sentences adjudged by Courts-Martials. This injustice arises not out of any desire of members in the court to be overly harsh or vengeful, but it is due to the fact that most members of Courts-Martial have had no training or experience in the elements of corrective punishment. They know only by rumor what sentences have been considered appropriate in other commands. Only a member of the Judge Advocate General's Department has sufficient knowledge and training to adjudge an appropriate sentence.

Therefore, it would seem to me to be advisable to take away from the members of the Court, other than the law member, the power to fix and impose sentences. Such power should be placed solely in the hands of the law member. The other members would sit only to determine questions of fact of guilt or innocence. These members should have the power to recommend sentences to the law member, and these recommendations should be part of the record for review. We have long recognized the necessity of separating the fact-finding functions and the judicial functions of our civil and criminal Courts and that sentences should be imposed by men of special knowledge and training.

The recommendation of the Advisory Committee that a board of officers be constituted to consider changes in the Articles of War and the *Manual* of Courts-Martial and that such study be a continuous one, will be enthusiastically endorsed by lawyers who saw service. As long as we as a Nation accept the doctrine of preparedness, our military law must be kept up-to-date, just as our arms and defenses must be. Why? Because our system of military justice is a vital part of our military system.

WILLIAM L. RANSOM, JR.
Binghamton, New York

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"The Defense of Delivered Price Systems":* A defense of the administrative policy of the Federal Trade Commission regarding delivered price systems—identical prices among competitors despite substantial differences in the cost of delivery—appears in the December issue of *The George Washington Law Review* (Vol. 15—No. 1; pages 1-38). The author, Walter B. Wooden, Associate General Counsel to the Commission, in replying to the article entitled "The Attack Upon Delivered Price Systems" which appeared in Volume 14 of the same law journal at page 397, analyzes the basing-point system and the delivered price system as used by chain producers of a commodity, and argues persuasively in support of the Commission's view that price discrimination based on differences in location is unlawful because of their natural tendency to promote monopolistic activity. (Address: The George Washington Law Review, The George Washington University, Washington, D. C.; price for a single copy: $1.00).

AIR RIGHTS—*"Airports and their Neighbors":* The law of air space rights, as it applies to the conflicting interests of those using airports and the occupants of adjacent property, is discussed by Dix W. Noel in the December issue of the *Tennesseee Law Review* (Vol. 19—No. 5; pages 563-581). *United States* v. *Causby*, 66 Sup. Ct. 1062 (1946), recently decided by the Supreme Court (the only case in which the Court has dealt with the subject) is analyzed in connection with the four theories of air space rights: "Unlimited Ownership", "Possible Effective Possession", "Actual Use" and "No Ownership". Cases wherein it was sought to declare that airports are nuisances are also reviewed. In conclusion, the author points out that many future difficulties may be avoided by appropriate airport zoning regulations. (Address: Tennessee Law Review Association, 720 West Main Avenue, Knoxville, Tennessee; price for a single copy: 75 cents.)

AIR TRANSPORTATION—*"Regulation of Rates in Air Transportation":* The November issue of *The Louisiana Law Review* (Vol. VII—No. 1; pages 1-22) is highlighted by an informative discussion of the regulation of air transport rates, a subject which is of growing legal significance. William C. Burt and James L. Highsaw, Jr., attorneys for the Civil Aeronautics Board, have outlined the development of the air transport rate regulation machinery from its inception in 1938 (Civil Aeronautics Act) to the present, in the fields of domestic and overseas carriage (i.e., between the continental United States and overseas territories and possessions), on the one hand, and international carriage on the other. As to the former, the regulatory pattern follows that of the Interstate Commerce Act. Although the traditional standard of "just, reasonable and non-discriminatory" rates exists, the principal formal rate proceedings to date before the Board, at least in the passenger field, have been concerned primarily with the wartime "economic stabilization" program. The authors describe the intricate regulatory problems which at present are dealt with by international traffic conferences adapted from the ocean shipping field, rather than by unilateral national regulation. It is stated that in a second installment the same contributors will discuss the problems of mail transportation for the Government. (Address: Louisiana State University Press, University Station, Baton Rouge, La.; price for a single copy: $1.00).

ANTI-TRUST LEGISLATION—*"The Entertainment Industry and the Federal Anti-trust Laws":* An extended discussion of the application of federal anti-trust laws to various fields in the entertainment industry is presented by Bernard Reich in the December issue of the *Southern California Law Review* (Vol. XX—No. 1; pages 1-36). Initially, the author finds a "basic criterion" for determining whether the anti-trust laws have been violated. The mere presence of interstate activity, restraint, commerce or trade, and damage to the plaintiff do not constitute a violation,

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

for according to the formula of the author, "The object of the unreasonable restraint must be interstate, the object of the unreasonable restraint which is interstate must be trade or commerce, and the object of the unreasonable restraint which is interstate and which is trade or commerce must have damaged plaintiff." This formula is applied to trade practices of the theatrical, musical, baseball and the motion picture industries which have been the subject of anti-trust suits. In conclusion, the author suggests that a Federal Anti-trust Commission combining the pertinent functions of the Department of Justice, Federal Trade Commission and Federal Communication Commission, and which would be subject to a review by the Courts, be instituted for the enforcement of the federal anti-trust laws. (Address: Southern California Law Review, 3660 University Avenue, Los Angeles 7, Cal.; price for a single copy: $1.00).

CIVIL LIBERTIES – *"Religious Liberty and the Fourteenth Amendment":* In the November number of the *Georgia Bar Journal* (Vol. IX–No. 2; pages 141-159), Ivan C. Rutledge, Professor of Law at Mercer University, analyzes the fifteen "freedom of religion" cases decided by the United States Supreme Court following *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). He points out that, in the "freedom of religion" cases, the Court has been less in agreement, and in fact less consistent, than in its decisions dealing with freedom of expression. The author suggests that the difficulty of determining what is the exercise of religious freedom could be avoided and a genuine basis for an inquiry into the substantive content and mode of application of State legislation could be found by approaching the problem through the application of the "equal protection of the laws" clause of the Fourteenth Amendment. (Address: Georgia Bar Journal, Macon, Ga.; price for a single copy not stated).

CONSTITUTIONAL LAW – *"The 1940 Amendment to the Diversity of Citzenship Clause":* The constitutionality of the 1940 amendment of Section 24 of the Federal Judicial Code, which undertook to open the jurisdiction of the Disrict Courts of the United States to citizens of the District of Columbia and the Territories on grounds of "diversity", is discussed, with related questions of construction and venue, in the December issue of the *Tulane Law Review* (Vol. XXI–No. 2; pages 171-191). John A. Dykes, Statutory Interpretation Editor of that law journal, and Arthur J. Keefe, Professor of Law in the Cornell Law School, point out that the amendment has been held valid and invalid in varying decisions in District Courts, but that no ruling as to its constitutionality has yet been made by any of the Circuit Courts of Appeal or by the Supreme Court. It is their view that the amendment ought to be upheld as constitutional, either under a liberal interpretation of Article III of the Constitution defining the scope of federal judicial power or as a reasonable exercise of the broad powers which the Constitution grants to Congress to legislate for the territories and the District of Columbia. Judge Conger's considered opinion in *Behlert* v. *James Foundation,* 60 F. Supp. 706, is to the contrary. (Address: Tulane Law Review, Tulane University College of Law, New Orleans, Louisiana; price for a single copy: $1.00).

CONTRACTS – *"Legality of Agreements to Pay Interest on Interest in New York":* An interesting "comment" under the above title is in the November issue of the *Fordham Law Review* (Vol. XV–No. 2; pages 269-278). An early New York case *(Young* v. *Hill,* 67 N. Y. 162) held agreements to pay interest on interest to be invalid because such agreements ". . . may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive, and even ruinous. . . ." The author notes that application of the rule invalidating such agreements has been productive of confusion in the New York law, and suggests that the rule is not compatible with the needs of an industrialized and commercialized society in which creditors and debtors are alert to their obligations. He expresses hope that the New York Court of Appeals may discard the rule. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00).

CORPORATIONS–*"New Aspects of Stockholders' Derivative Suits":* In the January issue of the *Columbia Law Review* (Vol. 47–No. 1; pages 1-32), George D. Hornstein, of the New York Bar, comments adversely upon recent legislation in New York and other States regulating stockholders' derivative suits. The article supplements his article in 1942 (42 *Columbia Law Review* 574) and discusses the operation of the statutory requirements relating to security for expenses, contemporaneous stock ownership, statute of limitations, indemnification for directors' litigation expense, etc., in the light of current decisions both in the State and federal Courts. Reference is made to procedural problems involved in the termination of stockholders' derivative suits and the award of compensation to complainants' attorneys and accountants. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

HOUSING–*Contemporary Problems Related to the Shortage of Housing:* The first issue of the 1947 volume of *Law and Contemporary Problems,* published by the Duke

University School of Law (Vol. XII—No. 1, pages 1-205) contains a comprehensive survey of various aspects of the current housing shortage. It is composed of a series of articles by specialists who cover social and economic phases as well as questions of law and legislation. The viewpoint predominant is that of the governmental administrator, rather than of the individual lawyer or business man who has to struggle with the housing problem in a typical town or city anywhere in the United States. The statistical analysis of the extent of the shortage in housing, by P. M. Hauser and A. J. Jaffe (pages 3-15), will interest any reader. To lawyers, the exceptionally good essay on "Real Property Law and Mass Housing Needs", by Shirley Adelson Siegel (pages 30-46), is of special interest and usefulness. (Address: Law and Contemporary Problems, Duke Station, Durham, N. C.; price for a single copy: $1.00).

INTERSTATE COOPERATION—*"Tennessee and The Interstate Compact to Conserve Oil and Gas":* Membership in the Interstate Oil Compact Commission, by those States which are principally concerned with the problems arising from the dissipation of oil and gas resources, is urged by Blakely M. Murphy in an article in the December issue of the *Tennessee Law Review* (Vol. 19—No. 5; pages 551-562). The Interstate Oil Compact and its operation through the Interstate Oil Compact Commission, as well as the contractual and moral responsibilities of the member States, are discussed against a background of the early and not entirely satisfactory federal and individual State administrative experiments in regulating the petroleum industry. Existing Tennessee legislation relating to the conservation of petroleum and the Tennessee agency which is charged with administering such legislation (the State Oil and Gas Board), are considered by the author substantially to meet the requirements of the Compact. The formal step necessary for Tennessee's entrance into the Compact is said to be the passage by the Tennessee General Assembly of an enabling Act, a proposed form of which is with the article. (Address: Tennessee Law Review Association, 720 West Main Avenue, Knoxville, Tenn.; price for a single copy: 75 cents).

LEGAL EDUCATION—*"A Century of Legal Education" (in North Carolina):* The June issue of *The North Carolina Law Review* (Vol. 24—No. 4; pages 307-445), which has come from the press only recently, surveys the developments in legal education in the State of North Carolina during the past century. By far the most valuable, as well as the most interesting feature is the exhaustive historical study by Professor Albert Coates. He traces the growth of legal education as such, and also of the legal profession, from colonial days in North Carolina to the present time. This exceptionally good piece of legal history ought to be in the libraries of those interested in the records of American institutions. There is a separate essay by Lucile Elliott, Librarian at the University of North Carolina Law School, a nostalgic piece by Thomas Ruffin, of Washington, D. C., who was a professor of law at Chapel Hill early in the century, and more generalized articles on legal education by Dean Ferson of the College of Law at the University of Cincinnati, Dean Leon Green of Northwestern University Law School, and Dean McCormick of the University of Texas Law School, each of whom had earlier associations with Chapel Hill. (Address: North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents).

LEGISLATION — *"The Federal Lobbying Act of 1946":* A "comment" in the January issue of the *Columbia Law Review* (Vol. 47—No. 1; pages 98-109) examines the scope and purport of the 1946 legislation of the Congress as to lobbying. It is suggested that the Act contains several apparent contradictions and ambiguities. The author expresses his opinion that the Act was neither carefully drafted nor fully considered, and that, under its ambiguous terms, effective regulation of the ramified activities of Washington lobbyists may be difficult. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

MORTGAGES — *"Government and the Mortgage Debtor":* A contribution by Robert H. Skilton, Associate Professor of Law in the Wharton School of the University of Pennsylvania, in the December issue of the *University of Pennsylvania Law Review* (Vol. 95—No. 2; pages 119-143) reviews the record of government intervention in the mortgage market from 1940 to 1946. The author points out that moratory legislation was enacted in New York State in 1933 and has been extended each year since that time, although the justification for the moratorium, as set forth in the statutes, would be the continued existence of an emergency in the mortgage market. He also notes that, in the enforcement of anti-deficiency judgment legislation in Pennsylvania, great latitude has been given to lower Court judges for the determination of the "fair value" of property. Mr. Skilton states that the operations of the Home Owner's Loan Corporation since 1940 make it clear that any money loss by HOLC in final liquidation will be insignificant in comparison with the magnitude of the undertaking of that agency. He believes, however, that it may be time for Government to require mortgagees to assume risk without reliance upon the Federal Housing Administration, and that the drastic 1945 revisions in the loan provisions of the so-called G.I. Bill of Rights may have a serious infla-

tionary effect upon the mortgage market. (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia 4, Pa.; price for a single copy: 75 cents).

PATENT LAW–MONOPOLIES –*"Compulsory Patent Licensing by Anti-trust Decree":* The provisions incorporated in anti-trust decrees for the purpose of effectively restoring competitive conditions, and the means available for the enforcement of such provisions, in situations where criminal penalties and injunctions in the ordinary "cease-and-desist" form appear inadequate, are analyzed in a fifty-page "comment" in the November issue of *The Yale Law Journal* (Vol. 56– No. 1; pages 77-126). As its title indicates, the discussion centers around compulsory licensing provisions, especially those in the recent *Hartford-Empire* decree, and the various administrative possibilities for the enforcing of such decrees. Suggested as possible enforcement agencies are the Anti-Trust Division of the Department of Justice, special masters appointed by the Court, the Federal Trade Commission, and arbitral tribunals. (Address: The Yale Law Journal, Yale Station, New Haven, Conn.; price for a single copy: $2.)

PATENT LAW–MONOPOLIES –*"Invalid Patents and Price Control":* That the validity of a patent should be subject to collateral attack in an anti-trust proceeding by the Government to render unlawful price-fixing agreements based upon such patent, is the principal contention of Professor Roscoe T. Steffen, of the Yale School of Law, in the leading article in the November issue of *The Yale Law Journal* (Vol. 56–No. 1; pages 1-25). Starting with a statement of the "almost self-evident" proposition "that price-fixing agreements, when based on invalid patents, are illegal", the article launches into a comprehensive discussion of what the author calls "a sort of preliminary question: Whether the Government, having itself issued the patents, may properly be heard to question their validity?" This question was answered in the negative by a three-judge Statutory Court in the District of Columbia in *United States* v. *United States Gypsum Co.* (53 F. Supp. 889), in which the author was one of counsel for the Government. The article is an exposition of Government contentions which did not prevail in that case. (Address: The Yale Law Journal, Yale Station, New Haven, Conn.; price for a single copy: $2.)

TAXATION – *Federal Income Taxes–"Federal Tax Effects of Powers of Management and Control Over Trust Investments":* Another indication of the intense interest in the treatment, for tax purposes, of grantor-controlled trusts is furnished by the article under the above title by Emory S. Naylor, Jr., of the Chicago Bar, in the November-December issue of the *Illinois Law Review* (Vol. XLI–No. 4; pages 508-525). In addition to the income tax aspects, the author reviews briefly the related problems in the estate tax and gift tax fields. Although written prior to the recent amendment of the Commissioners' Regulations relating to the status of such trusts, the material in Mr. Naylor's article is not substantially affected thereby. (Address: Northwestern University Press, 357 East Chicago Ave., Chicago, Ill.; price for a single copy: $1.00).

TORTS–LIBEL–*"New Remedies for Errors in the Press":* Professor Zechariah Chafee, Jr., of the Harvard Law School, contributed to the November issue of the *Harvard Law Review* (Vol. LX–No. 1; pages 1-43) a most interesting discussion of possible new remedies for errors in the press. According to a footnote, the article comprises two sections from his forthcoming and no doubt authoritative book, *Government and Mass Communications,* which will be an end-product of the work of the Commission on the Freedom of the Press. Pointing to the harm which is often done to individuals and businesses today by misrepresentations and inaccuracies published in newspapers and other types of mass communications, Professor Chafee poses the question whether the time has not come for a more drastic legal attitude toward disregard of truth. Wilful "smears", in books, magazines, newspapers, and on the radio and even the "press releases" of government agencies, have become familiar methods of propaganda campaigns to destroy or punish those who resist "pressure groups". The distinguished author is of the opinion that the criminal law is not well adapted to handle these problems, and that an obligatory correction of errors, in the form of a right of reply *(droit de réponse)* or of compulsory retraction, may be a part of the remedy. He refers to the previous legal experience with the correction of press errors in France, Germany, England and the United States, and draws conclusions as to the desirability of new legal remedies for libels and other misstatements of fact. He also makes suggestions for framing an American statute embodying the right of reply, but expresses the view that, despite the possible desirability of the compulsory right of reply, the "chief cure for falsehoods in mass communications should be sought outside the realm of law", and that the "remedy for falsehood in the communications industries is to extend and strengthen by all possible means the professional obligation to tell the truth." (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

TRUSTS–*"A Reappraisal of the Revocable Trust":* Dean Edward C. King of the School of Law of the University of Colorado has written

for the *Rocky Mountain Law Review* for December, (Vol. 19—No. 1; pages 1-21) an interesting and instructive article on the use of revocable trusts. He purports to limit his exposition to cases involving claims by the surviving spouse of the deceased settlor of a revocable *inter vivos* trust that the trust is invalid as against her because it is colorable or in fraud of her right to share in the settlor's estate. His discussion, nevertheless, has angles of more general interest. He points out that the attempts of settlors to steer as close to the line as possible, to deprive their families of interests in their estates while at the same time reserve to themselves a full measure of control, has endangered the whole concept of revocable trusts and may impair their usefulness as substitutes for agency arrangements and as a means of making family settlements. The author expresses the hope that the profession will exercise discretion and a wise discrimination in the use of revocable trusts. (Address: Rocky Mountain Law Review, University of Colorado, Boulder, Colo.; price for a single copy: $1.00).

TRUSTS AND ESTATES—*"The Cy Press Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation":* The doctrine of *cy pres* (loosely translated "as near as") is usually thought of in connection with charitable trusts. The principle that if a grantor's purpose cannot be fully carried out the Courts should come "as near as" possible is met with at many places in the law. In an article by James Quarles in the *New York University Law Quarterly Review* for July, (Vol. XXI—No. 3; pages 384-399), the doctrine is examined in its relation to limitations which offend the rules limiting the duration of trusts and the extent to which income may be accumulated. The author's purpose is to draw attention to the fact that many Courts, when faced with an invalid provision, do not annul it completely but hold it good within prescribed limits. He chides the American Law Institute for what seems to him an ignoring of this doctrine in its Restatement of the rules as to perpetuities and accumulations. It should be noted, however, that the Restatement does recognize elsewhere that Courts are justified in effectuating as far as may be possible a testator's presumed intent. See, for example, Restatement of the Law of Property, Section 243, Comment n; Section 295, Comment t. (Address: New York University Law Quarterly Review, Washington Square, New York City; price for a single copy: $1.00).

WATERS AND WATERCOURSES—*"Wisconsin Law of Waters":* "There is no branch of law in which the rules differ so widely in different sections of the United States and from State to State as that branch of law which pertains to waters", says Commissioner Adolph Kanneberg of the Wisconsin Public Service Commission in the July issue of the *Wisconsin Law Review* (Vol. 1946—No. 4; pages 345-393). His article deals primarily with the legal situation in Wisconsin, where, for certain purposes, a stream is "navigable" if it will float saw-logs. After tracing the history of the legislative and judicial formulation of the law of waters in that State, the author discusses in detail the jurisdiction and powers of the Public Service Commission under the broad grant of legislative authority to it over the flow and level of waters, the construction of dams in navigable streams, the diversion of surplus waters from one watershed to another, the construction and maintenance of private bridges across navigable waters, obstructions in navigable waters, and State contracts for dredging in navigable lakes and dams in non-navigagle streams. (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents).

Nominated to Serve as Officers and Members of Board of Governors

The following were nominated by the State Delegates at the mid-year meeting, February 24-26, to serve as officers of the Association for 1947-48: President, Tappan Gregory, of Chicago; Treasurer, Walter M. Bastian, Washington, D. C.; Secretary, Joseph D. Stecher, Toledo, Ohio. Charles Ruzicka, of Baltimore, Maryland, Albert B. Houghton, of Milwaukee, Wisconsin, and James G. Mothersead, of Scottsbluff, Nebraska, were nominated as members of the Board of Governors, for three-year terms, from the Fourth, Seventh and Eighth Circuits respectively.

20

Our Younger Lawyers

by William R. Eddleman • Secretary, Junior Bar Conference

■ Editor Jack Foster, of the *Rocky Mountain News* of Denver, Colorado, delivered an address on lawyer-laymen cooperation at the luncheon sponsored by the Junior Bar Conference on Saturday, January 25 as the final and climaxing event of the regional meeting of the American Bar Association held in Omaha. Theodore L. Richling presided and James D. Fellers, National Chairman of the Conference, spoke briefly on young lawyers in action. The event was well attended and participated in by young lawyers from each of the surrounding States.

Fred Hall, Councilman for the Tenth Circuit, was in attendance. The Kansas Junior Bar, which he formerly headed, has just been reorganized at a meeting attended by about 100 young attorneys from the State of Kansas and is now known as the Junior Bar Section of the Bar Association of the State of Kansas, including in its membership all attorneys of the State of Kansas under the age of thirty-six years who are members of the Kansas Bar Association or of the American Bar Association. Present officers are: Chairman, Judge Howard C. Kline, Wichita, Kansas; Vice Chairman, Howard M. Immel, Iola, Kansas; Secretary-Treasurer, Ruth B. Gough, Chanute, Kansas; and Clark MacPherson, Topeka; Nolton E. Carson, Kansas City; Robert N. Allen, Chanute; J. Ashford Manka, Wichita; Robert C. Hall, Madison Lodge; Ben Marshall, Lincoln; members of Council. The Kansas Junior Bar Section is organized on the basis of one member of the Council for each Congressional District. At each annual meeting of the Kansas Bar, it is to have charge of one portion of the program. As to its own activities, these have been largely centered upon the program of the younger lawyers of the American Bar. It is cooperating fully with the lawyer veteran placement committee of the Kansas State Bar and reports that there are few, if any, young lawyers of the State of Kansas who do not have suitable employment.

One of the outstanding events of recent months was the Jackson Law Institute, sponsored by the Jackson Junior Bar Association, whose sessions were devoted to taxation, oil and gas, and evidence. This was attended by approximately 350 attorneys from all parts of Mississippi, and was addressed by William A. Sutherland of Atlanta, who spoke on Tax Practice and Procedure; Martin Row of Dallas, Texas, who spoke on Oil and Gas and Federal Taxation; Dean Edmund Morgan, retired Dean of Harvard Law School, who spoke on the Model Code of Evidence; and numerous other outstanding and prominent individuals. Officers of the young lawyers of the sponsoring group were B. W. Chill, chairman, Warren V. Ludlam, George Woodliffe, Mrs. Margaret McLean and Bonner Landman, through whose efforts the program was an outstanding success and has been highly recommended by those in attendance as a suitable project for other groups throughout the country. Warren V. Ludlam, Jr., President; George Butler, Jr., Vice President; and Sidney Smith, Jr., Secretary-Treasurer, are new officers of the Jackson Junior Bar, whose membership includes approximately seventy-five active participants.

The young lawyers section of the Indiana State Bar Association, whose retiring Chairman is John E. Early, of Evansville, is just completing an outstanding program on Relations with Law Students, which consists of a series of five talks:

1. The salaried lawyer in a metropolitan firm.
2. The salaried lawyer with a corporation.
3. The lawyer in public office.
4. The lawyer in a government agency.
5. The lawyer in a small community.

After each of these talks, the graduating students are afforded an opportunity to ask any and all questions of the speaker. Among recent participants in the program are the Honorable John A. Emmert, Attorney General of Indiana. These programs were conducted at Notre Dame University, Valparaiso University and the School of Law of the University of Indiana. The Indiana group sponsored a luncheon for all of the recently admitted members of the Indiana Bar, at which almost 100% membership in the American Bar Association was promptly obtained; after which members accompanied the new young lawyers to the Federal District Court and moved their admission to practise there.

The Barristers Club of San Francisco affords to the various veterans organizations either free or low cost legal advice for veterans through members who have voluntarily placed their names on a panel as available for free consultation, at which a veteran is advised of his rights, duties and obligations and if any additional arrangements are necessary for legal service, the same is arranged between the veteran and the participating member of the panel, at a low fee basis. Also, members of the Barristers Club are presently delivering a series of lectures to the high schools in San Francisco, the object of which is to thoroughly inform the members of the Senior Class of the effect of law upon their everyday life and transactions. The retiring President is John L. Swain. The San Francisco

Barristers sponsor a social event to which the newly admitted members of the Bar are invited, and at which their participation in Bar activities is solicited. James E. (Ned) Burns, Councilman for the Ninth Circuit, is an active member of the San Francisco Barristers and former officer.

Sidney Sachs, first editor of the *Young Lawyer,* is present Chairman of the District of Columbia Junior Bar Section, which at a recent meeting has adopted an integrated program, the object of which is to coordinate committee appointments of the local group with those of the national younger lawyers in the American Bar Association. A conference of the Traffic Court Committee in the District of Columbia under Charles H. Burton, local Chairman, has just completed a very successful session which was addressed by the Honorable Bolitha J. Laws, and included an address by Douglas W. McGregor, Assistant Attorney General, which was broadcast over the radio. Bryce Rea, Public Information Director, continues the radio program, heard weekly and entitled "The Lawyer Speaks", which is now going into its third year. At the annual meeting of the Bar Association, the Junior Bar Group collected almost $2,000 with which to secure a Capehart radio and phonograph which was presented to the Honorable Justice Bailey, who was completing his 29th year of service on the bench and celebrating his 80th birthday. This active group has monthly luncheon meetings at the final of which, in customary form, the nominees for the Presidency of the Bar Association will speak on "Why you should vote for my opponent".

Other radio programs which have attracted attention and being heard weekly are the programs over Station KRSC, headed by Calmar M. McCune, of the Washington State Bar, the weekly program at South Bend, Indiana under the guidance of Maurice N. Frank and the programs in the State of Iowa, known as the Round Table.

21

Notice by the Board of Elections

▪ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1947 Annual Meeting and ending at the adjournment of the Annual Meeting in 1950:

Alabama
California
Florida
Hawaii
Kansas
Kentucky
Massachusetts
Missouri
New Mexico
North Carolina
North Dakota
Pennsylvania
Tennessee
Territorial Group
Vermont
Virginia
Wisconsin

Election will be held in the State of Missouri for State Delegate to fill the vacancy in the term expiring at the Adjournment of the 1947 Annual Meeting.

Election will be held in the State of Wyoming for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1948 Annual Meeting.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. Nominating petitions for all State Delegates to be elected in 1947 must be filed with the Board of Elections not later than April 25, 1947. Forms of nominating petitions for the three-year term, and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. **Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. on April 25, 1947.**

Attention is called to Section 5, Article VI of the Constitution which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Additional signatures received after a petition has been published will not be printed in the JOURNAL. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS

Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

22

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Philip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Family Trusts—Amendment of Clifford Regulations

■ On January 28, the Bureau gave notice of its proposed amendments to the regulations issued on December 29, 1945, with respect to the taxation of trust income to the grantor under the doctrine of the *Clifford* case. See Reg. 111, Sec. 29.22(a)-21, added by T.D. 5488. The proposed amendments make several important changes in favor of trust flexibility, and answer many of the criticisms which have been leveled at the Bureau during the past year.

(a) *Reversion after life estate.* Under the original regulations, if the life tenant had a life expectancy of less than 10 years, a reversion in the grantor was enough to make the trust income taxable to him. Under the proposed amendment, such a reversion is by itself not sufficient to create the tax.

(b) *Powers exercisable by spouse.* In several instances the original regulations treated a power held by a spouse living with the grantor as equivalent to a power held by the grantor alone. The amendments now limit such treatment in some instances to a case where the spouse does not have "a substantial adverse interest in the corpus or income of the trust". It may be noted that this phrase is used in the statute on other aspects of the trust income problem, and is itself a difficult subject of interpretation. Where, however, the grantor's wife has a vested interest in trust income or corpus, it may be assumed that she will be treated as a stranger for this purpose.

(c) *Power to accumulate or distribute income.* The effect of the grantor's discretionary power to accumulate or distribute trust income is one of the most controversial aspects of the *Clifford* problem. The courts are now struggling with the problem, and no satisfactory judicial solution is in sight. The 1945 regulations attempted to define the permissible limits of such a power, and the proposed amendments clarify and enlarge the discretionary power which the grantor may retain. Generally, income may be accumulated if the accumulation must ultimately be paid to the income beneficiary, or, if the income beneficiary has died, to his estate or to an irrevocably designated alternate taker other than the grantor or his estate. It is specifically provided that the grantor may retain the power, during the minority of a current income beneficiary, "to distribute or apply income to or for such beneficiary or to accumulate and add such income to corpus".

(d) *Power to apportion income.* In the original regulations, a trustee could be given the power to apportion income within a class of beneficiaries only if "a reasonably definite external standard", consisting of "the needs and circumstances of the beneficiaries", was set forth in the trust instrument. Moreover, the trustee having such power could not be the grantor or his spouse. Under the proposed amendments, the trustee (other than the grantor or his spouse) may have such a power, and no "standard" need be specified unless any of the trustees are the father, mother, issue, brother, sister, or employee of the grantor or of his controlled corporation, and unless the class of beneficiaries includes the wife or any child of the grantor.

(e) *Power to distribute corpus.* The original regulations permitted the grantor to retain a power to pay out corpus to or for a current income beneficiary, provided that the distribution would be charged against his share of the corpus or provided that a "reasonably definite external standard" was set forth in the instrument. The amendments would also allow the grantor to give such a power to a trustee other than himself or his spouse, without the foregoing limitations, in the same manner as a power to apportion income (discussed in the preceding paragraph).

(f) *Power to borrow.* Under the proposed amendments, the instrument may permit the grantor to borrow from the trust with adequate security and interest, if the power to make the loan is not exercisable by the grantor or a non-adverse party, and is not exercisable in a nonfiduciary capacity. If the loan has actually been made, however, the principal and interest must have been completely repaid before the beginning of the taxable year.

(g) *Powers not exercisable as trustee.* The regulations state that several kinds of administrative control (e.g., voting stock, directing investments, etc.) are fatal if exercisable by "any person in a nonfiduciary capacity". One of the most questionable provisions of the original regulations was the statement, "If a power is not exercisable by a person as trustee, it is presumed that the power is exercisable in a nonfiduciary capacity". The amendments liberalize this rule in the following language: "If a power is not exercisable by a person as trustee, the determination of whether such power is exercisable in a fiduciary or a nonfiduciary capacity depends on all the terms of the trust and the circumstances surrounding its

creation and administration. For example, where the trust corpus consists of diversified stocks or securities of corporations the stock of which is not closely held and in which the holdings of the trust, either by themselves or in conjunction with the holdings of the grantor, are of no significance from the viewpoint of voting control, a power with respect to such stocks or securities held by a person who is not a trustee will be regarded as exercisable in a fiduciary capacity primarily in the interests of the beneficiaries."

Unquestionably the regulations will still be attacked, both in and out of court, but the amendments evidence a sincere attempt by the Bureau to permit reasonable flexibility in trust draftsmanship and administration, and they cure many of the defects which prompted valid criticism.

23

Letters to the Editors

Restoring the Powers and Duties of States

To the Editors:

Your entire January editorial, "For a Republican Form of Government" is excellent. In my opinion, the fifth division is the most important part of it. State legislatures, governors and other State officials can do more to restore to the States their proper functions in our governmental scheme than any of the others mentioned. Their inaction in the past has been largely the cause of the loss by the States of such functions.

When we have been confronted with conditions demanding State action, the National government has often been forced to act because the State governments failed to do so. On the other hand, some of the so-called "encroachments" have been directly occasioned by the affirmative action of the States in setting up various barriers at State borders, which have had a burdensome effect upon the free flow of commerce—the sort of thing which initiated the movement for a Federal Constitution.

It may also be suggested that necessity for action at the National level may be avoided in many instances by the adoption of Uniform Acts by the States. By this means, conflicts as between the States, which would otherwise inspire pressure-group appeal to Congress, can be avoided. This is one cogent reason why the work of the National Conference of Commissioners on Uniform State Laws should receive the encouragement and support of every lawyer.

J. C. Pryor

Burlington, Iowa

"What Goes On in Your Community?"

To the Editors:

We note with dismay your editorial comments in the December Journal (Vol. 32—page 865) on "What Goes On in Your Community?" To quote: "An incessant and insidious propaganda for extremes of view, deleterious to the American form of government and the American foreign policy, is in progress in and through these small and little-noticed discussion groups. Almost without exception, the speakers seem to come from left-wing organizations, . . . The subjects often suggest advocacy of drastic changes in the American structure of government and society, and often denote agitation for some form of 'world government now' . . . Rarely does anyone attend to combat and refute the left-wing pronunciamentos. As a result an increasing and surprising number of well-intentioned people are being misled."

It is clear from the foregoing that you wish well-intentioned but poorly informed people to believe that the advocates of world government are left-wing agitators bent on undermining the American form of government. Yet a casual survey of some of the more active proponents of world government in this country would quickly dispel any such notion. To mention but a few, how could our own Mr. Justice Owen J. Roberts, Grenville Clark, or Robert N. Wilkin be labelled for left-wingers?

The Protestant Episcopal Church, the Bar Associations of the States of Tennessee and New Hampshire, the legislatures of Alabama, Connecticut, Florida, Georgia, Louisiana, Maryland, North Carolina, New Hampshire, New Jersey, Oklahoma, Rhode Island, Utah, Tennessee, and Virginia, and many other equally respectable groups have all adopted resolutions urging the formation of a world government. Are they to be cavalierly dismissed as left-winged?

As a matter of fact if the Editors would look into the annals of world government organization, they would find that the bitterest and most constant opponents of the cause are the Communists. Their case is clearly stated in *New Masses,* July 16 and 23, 1946, which calls the movement for world government "reactionary utopianism."

Even in this very same issue of the Journal (page 842) Sumner Welles is quoted as follows: "The Soviet Government has repeatedly and officially declared not only that it opposes any form of world government but also . . ." The evidence does not justify the inference that advocates of world government are left-wing agitators.

Your editorial further suggests that these people are propagating ideas

deleterious to the American form of government and urges that more lawyers attend these meetings in order "to combat and refute the left-wing pronunciamentos" by giving "robust explanations of the American plan of government, the opportunities and freedoms vouchsafed by our Constitution . . ." But if the Editors had attended more of these meetings, they would have discovered that the proponents of world government have always preached the American form of government; they have invariably advocated a republican and federal form of world government; they have consistently pointed to the formation of our own federal government—to the Union of the thirteen colonies under our Constitution—as an example and the best evidence of what can be achieved through the establishment of world government; they have warned that this is the only way of protecting our children and our form of society from another more devastating world war. How, then, could their propaganda be deleterious to our form of government?

Finally, may we say we are glad that the JOURNAL has in the past probably done as much as any other periodical for the dissemination of information in the cause of world government (e.g. pages 13, 22, 28, 37, 146, 171, 227, 267, 269, 639, 643, 759, 841, and many others in Volume 32.) The sudden and complete reversal of policy on the part of the JOURNAL which is heralded by the belligerent—and, we believe, unfair—tone of this editorial appears to us most unfortunate.

We respectfully request the early publication of this letter in the JOURNAL.

JOHN ROSS DELAFIELD
WILMURT BURR LINKER
A. J. G. PRIEST
PAUL FULLER, JR.
THOMAS K. FINLETTER
RICHARD B. SCANDRETT, JR.
JOSEPH C. THOMSON

New York City

EDITORS' NOTE: According to its custom and its duty, the JOURNAL has given active editorial endorsement to the attitude and policy which the House of Delegates has voted repeatedly as to "united" and "undivided" support of The United Nations. From the first, we have opposed all proposals and all views which tended to divide and weaken American support of that Organization. At the same time, within our limited space, we have published more than a few articles which have differed from the Association's stand. Our correspondents mention some, but not all, of these; the latest was Robert N. Wilkin's earnest plea in our January issue for an international juridical order and for "government of world affairs", something more than The United Nations. Consistently with our purpose to support the Association's stand, we have not closed our columns to reasoned expressions of opposing views.

The editorial, "What Goes On in Your Community?", was meant to be factual and admonitory, to suggest to lawyers that American ideals of government and American objectives of foreign policy should be advocated in forums, etc., in their home communities. There was no thought of suggesting that all advocates of "world government now" are iden-

tified with Left Wing propaganda. Certainly none of the signers of the above letter could be so characterized.

There has been no change in our attitude or editorial course. Ever since the House of Delegates voted in 1944 that it opposed "as unnecessary and unwise the creation of any manner of super-government or super-state" but favored "organized international cooperation" which it later approved strongly as embodied in the Charter of The United Nations, the JOURNAL has done what it could to support and advance that great cause.

When Emery Reves' brilliant book, "The Anatomy of Peace", largely created a significant movement for world government, the JOURNAL reviewed it favorably in many respects (32 A.B.A.J. 37), but expressed regret that he had enmeshed his advocacy of world government with such theses as the inadequacy and failure of The United Nations, the failure of religion (notably Christianity), the failure of capitalism and the private enterprise system, the need for breaking-down Nation-states, churches, tariff walls, immigration restrictions, etc. Later the explicit passages were quoted from his book (32 A.B.A.J. 179). When space was asked for to argue his case against The United Nations and for his concept of world government, we gave it (32 A.B.A.J. 267); two members of the Board of Editors joined in a reply (32 A.B.A.J. 270).

With the greatest respect for the sincerity and the earnestness of many who believe that The United Nations "is not enough" and should be discarded in favor of "world government", we have to say that a great deal of local advocacy of "world government" now seems to be based on the doctrines of Emery Reves rather than on the reasoned judgment of leaders such as Judge Robert N. Wilkin.

Advocates of "world government now" often insist in one breath that they are following the American federal pattern and also that Emery Reves' strictures against The United Nations Organization are sound. The JOURNAL has endeavored to show that Mr. Reves' analogies to American history are as unsound as his denunciations of Christianity, the free enterprise system, and Nation-states, and that the true verdict of our own history favors the UNO as the essential first step on the road to peace and law.

We note that at the first National convention of organizations favoring "world government," at Asheville, N. C., on February 21, Dr. Frank P. Graham, president of the University of North Carolina, said that the United States, the source of the atomic revolution of the twentieth century, had the obligation, in our time, of leading the countries into a federalist world society through the existing media afforded in the Charter of The United Nations. "The greatest momentum to war in the history of the world exists today," Norman Cousins, editor of the *Saturday Review of Literature*, told the meeting. He urged that delegates agree on a program to strengthen The United Nations and achieve federalist world government through that body. The American Bar Association and its JOURNAL have consistently favored strengthening and improving the Charter of The United Nations, and have opposed the contentions of those who seek to scuttle or weaken that Organization.

Classified

RATES *10 cents per word for each insertion: minimum charge $1.20 payable in advance. Copy should reach us by the 15th of the month preceding month of issue.*

BOOKS

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 48-page printed catalog, free on request, lists some used law books we have for sale, also indicates the type of material we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 6, Louisiana.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

LAW BOOKS BOUGHT, SOLD, EXCHANGED IRVING KOTHS, Metropolitan Bldg., Vancouver, Washington.

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporter System units, Digests Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. BOYLE, 705-07 Cotton Exchange Bldg., Oklahoma City, Oklahoma.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 Pages, 340 Illustrations. $10 Delivered, also "Questioned Document Problems" (a new book); 546 pages, $6 Delivered. ALBERT S. OSBORN, 233 Broadway, New York City.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 215 West 7th Street, Los Angeles 14, California.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

"THE HAND OF HAUPTMANN," Story of Lindbergh Case by Document Expert Cited by John Henry Wigmore, 368 Pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 7, N. Y.

EVERYTHING IN LAW BOOKS, GEO. T. BISEL CO., Philadelphia 6, Pa.

BUY—SELL—TRADE—LAW BOOKS, BOOKcases, steel shelving, filing cabinets, etc., LAWYERS SERVICE COMPANY, 715½ Chestnut, St. Louis 1, Missouri.

LAW BOOKS BOUGHT AND SOLD FOR Cash. We pay freight. Established 1918. References furnished. JOS. M. MITCHELL, 5738 Thomas Ave., Philadelphia 43, Pa.

PAMPHLET SUMMARY OF I.C.C. MOTOR Carrier Safety Rules by Joseph Kadans, of Baltimore Bar, 25c. HIGHWAY SERVICE BUREAU, Box 4408, Brookland, Washington 17, D.C.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: New York University Law Quarterly Review, Journal of Criminal Law and Criminology, Air Law Review, Notre Dame Lawyer, American Law Review, Central Law Journal, Oregon Law Review, Cincinnati Law Review, American Journal of International Law, U. S. Treasury Decisions under Internal Revenue, U. S. Interstate Commerce Commission Reports, U. S. Attorney General's Opinions, Decisions of Commissioner of Patents, U. S. Court of Claims, American Law Reports, American Maritime Cases. DENNIS & CO., INC., 251 Main Street, Buffalo, N. Y.

U. S. SUPREME COURT REPORTS—LAW. Ed.; in prime condition; 60 vols. calf, 61-89 buckram, complete; would sell for about $222. Luther E. Morrison, attorney, 2300 Graybar Bldg., New York 17.

COURT REPORTERS

INVESTIGATIONS, DEPOSITIONS, ETC., Texas and Old Mexico. Many years' experience. R. W. Nelson, Court Reporter, Brownsville, Texas.

HANDWRITING EXPERTS

EDWARD OSCAR HEINRICH, B.S., 24 California St., San Francisco 11. Experienced consulting and scientific laboratory service available when you have a suspected or disputed document problem of any kind. For additional information see Martindale Hubbell Law Directory, San Francisco listings.

Authentication problems in the fields of philately, diplomatics and the fine arts accepted for solution from serious collectors and administrators of estates. Write for further information.

SAMUEL R. McCANN, EXAMINER OF Questioned Documents, Office and Laboratory Ward Building. Telephone 5723—Yakima, Washington.

JOSEPH THOLL, 304-06 SCHOFIELD BLDG., Cleveland, Ohio. Examiner and Photographer of Questioned Documents. 15 years' experience serving Army Intelligence, the legal profession and official agencies. Photographic Specialist.

VERNON FAXON, 134 NORTH LA SALLE Street, Chicago 2, Illinois. Telephone CENtral 1050. Questions regarding identification of handwriting, typewriting, forgeries, etc.

BEN GARCIA. EXAMINER OF ALL CLASSes of questioned handwriting and typewriting. 7 years of practical experience. 308 Quincy Building, Denver, Colorado.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Twenty-five years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. Law & Finance Building, Pittsburgh, Pa. Phone Atlantic 1911.

INVESTIGATORS

SAN FRANCISCO, CALIF. COMPLETE INvestigation service for attorneys. RAYMOND & HALL, 58 Sutter St., San Francisco, 4.

MISCELLANEOUS

BOOK CASES—USED—GOOD CONDITION. Globe-Wernicke, Macey, Hale, Lundstrum, Stewart and Gunn bookcases in light oak, dark oak, walnut and mahogany finish. Price: $6.00 per case; $5.50 per top; $5.50 per base. Check with order—freight collect. If you wish to match your cases, indicate color, style and pattern numbers; type of base, whether open or closed; and type of top, whether square or convex. LAWYERS SERVICE CO., 715½ Chestnut, St. Louis 1, Missouri.

BOOKPLATES FOR BOOKLOVERS. DEsigned especially for you. C. VALENTINE KIRBY, 154 Willow Avenue, Camp Hill, Pennsylvania.

POSITIONS WANTED

FORMER GOVERNMENT LAWYER, AGE 43, seeks permanent connection with large private business organization anywhere. Experienced executive and administrator with bank and trust company background. Six years government legal work; ten years general practice. Member Pennsylvania and Wyoming Bars; Yale College graduate. Excellent references. Address Box BW, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Ill.

GOVERNMENT LAWYER, HARVARD LL.B. Practiced with large firm and had own office. Top positions in government, domestic and overseas, in surplus property and other agencies. Special experience in Congressional matters. Excellent contacts. Prefers position with trade association or similar organization, or with corporation, anywhere in U. S. Available as Washington representative. Box WA, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

MR. ATTORNEY: DO YOU NEED AN ABLE assistant? Ex U. S. Treasury attorney. B.S.C., LL.B., LL.M. Private practice. Tax, accounting, and real estate background. Age 30. Married. Overseas veteran. Present salary exceeds $6500. Interested in responsible position anywhere. Box SE, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

DEPARTMENT OF JUSTICE LAWYER, 31, veteran, Michigan University Law School Graduate, 1941 Administrative Law Specialist. Box DJ, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

TAX ATTORNEY—CO-AUTHOR OF NATIONally distributed text on Federal Taxation; present head of tax department of accounting firm. Experienced tax planning and litigation. Desires association with progressive law firm. Box DA, AMERICAN BAR ASSOCIATION JOURNAL, 1140 N. Dearborn Street, Chicago 10, Illinois.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED—The best of their kind—satisfaction guaranteed—Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.

TAKE A GOOD LOOK AROUND

It's

AMERICAN LAW REPORTS

In The Modern Lawyer's Office Library

American Law Reports in your library give you fifteen thousand exhaustive up-to-date texts on live legal questions. Furthermore, by reason of their scientifically built index and digest, they offer the quickest available means of finding case law.

From your own observation you know that they are used in many of the office libraries of your brother attorneys. This great popularity can only mean that they are serving well the the legal profession.

Write either publisher to send you full information as to how A. L. R. will serve you also. The Lawyers Co-operative Publishing Company, Rochester 3, New York, Bancroft-Whitney Company, San Francisco 1, California.